Board Members' Handbook of Legal Issues

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The Office of
Minnesota Attorney General Keith Ellison
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INTRODUCTION

This manual is designed as a guide for state boards, their members, and their staff. The Attorney General's Office hopes that the manual will serve both as a handbook for new board members and staff and as a reminder of relevant laws for those with more experience. The manual generally describes the role of boards in state government. It also discusses several important laws that apply to state boards' operations and activities. Although the manual is intended to be educational and informative, it is not a substitute for boards reviewing their specific statutes and rules or for seeking legal advice when specific situations raise legal questions.

I. ROLE OF ADMINISTRATIVE AGENCIES IN GOVERNMENT

State boards are a type of administrative agency. In the case of licensing boards, the legislature has given the boards the power to regulate specialized professions for which licenses or certificates are required. Board members often include both persons in those professions and public members who bring other backgrounds, knowledge, and experience to board activities. Serving as a board member comes with important responsibilities that members must take seriously. As outlined below, board members exercise various types of authority when making decisions and they must remain mindful of the legislative and constitutional restraints on that authority.

A. What Is an Administrative Agency?

A fundamental principle of the U.S. Constitution requires that executive, legislative, and judicial powers be exercised by separate branches of government, each of which may check or balance the others' actions. Administrative agencies occupy a unique place in government because they have statutory authority to exercise all three types of powers while performing their official business. An administrative agency is an entity within the executive branch of government. It exercises its authority to enforce the statutes enacted by the Minnesota Legislature. By adopting rules to further implement applicable statutes, it exercises "quasi-legislative" authority granted by the legislature. Finally, like courts, agencies also have "quasi-judicial" power to resolve particular kinds of disputes and to require individuals to give testimony as witnesses.

Because administrative agencies combine the powers of all three branches of government, the very existence of early administrative agencies troubled courts. Courts resolved this issue by recognizing that the danger to citizens' liberty is not in blended power, but in unchecked power. Two checks on agency powers have been established. First, only the legislature may create agencies. The legislature must declare a legislative policy and establish primary standards for agency actions. Agencies have authority to fill in details, through rules or adjudication, but agency action must be consistent with legislatively determined policy. Second, the judiciary operates as a check by retaining residual authority to prevent and rectify an agency's errors or abuses.

Judicial review of agency decisions is important. The role of the courts is twofold. First, courts ensure that the legislature does not unlawfully vest powers in an administrative agency. Second, courts ensure that administrative agencies exercise their powers within the limits set by the legislature and do so without violating anyone's rights. If a court finds that an agency exercised powers beyond the limits set by the legislature or that it violated a person's rights, the court may overturn the agency's decision.

B. Administrative Agencies and the Due Process Clause

The state and federal constitutions prohibit the state from depriving a person of life, liberty, or property without due process. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. A professional license is a property right to which the due-process clauses apply. In reviewing board procedures related to applicants' or licensees' property rights, courts recognize two types of due process: substantive and procedural. Substantive due process requires that board actions relate to the purpose for which the board exists. Procedural due process requires that a board deal fairly with those it regulates.

Due process primarily affects a board's adjudicative functions. A board acts in its adjudicative capacity when it reviews a particular individual or business's conduct, makes factual findings, and makes a decision affecting that individual or business. A party is entitled to notice of a proposed board action and, in some instances, to a "contested-case hearing" before a board makes a final decision affecting the party. For further discussion of contested-case hearings, see section IV of this manual.

Boards must take great care in implementing their responsibilities. The requirements of procedural due process are contained in court decisions, Minnesota's Administrative Procedure Act, the rules of the Office of Administrative Hearings, and other statutes and rules. Their purpose is to ensure fundamental fairness. The law also requires boards to follow certain requirements in establishing jurisdiction, interpreting legislative standards, and imposing remedies. Courts may review a board's actions to determine whether the board complied with due process requirements, acted within its jurisdiction, and reasonably interpreted the governing law.

II. ROLE OF THE ATTORNEY GENERAL IN GOVERNMENT

Boards vary in their scope and authority. While boards are ultimately responsible for making factual findings and deciding matters before them, legal issues often arise in which boards seek advice from the Attorney General's Office. This section outlines the office's role and structure.

A. Attorney General's Authority

The Minnesota Attorney General's power stems from three sources: the Minnesota Constitution, the Minnesota Statutes, and the common law derived from court decisions. The constitution establishes the Attorney General as the state's chief legal official within the executive branch. The Attorney General is elected by the state's voters. The Minnesota Statutes, particularly chapter 8, set forth some of the Attorney General's responsibilities. The Attorney General acts as the attorney for all state officers, boards, and commissions in matters pertaining to their official duties. Minn. Stat. § 8.06.

The Minnesota Supreme Court has described the Attorney General's expansive powers:

> The attorney general is the chief law officer of the state. His powers are not limited to those granted by statute but include extensive common-law powers inherent in his office. He may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. He is the legal adviser to the executive officers of the state, and the courts will not control the discretionary power of the attorney general in conducting litigation for the state. He has the authority to institute in a district court a civil suit in the name of the state whenever the interests of the state so require.

Slezak v. Ousdigian, 110 N.W.2d 1, 5 (Minn. 1961).

As an elected constitutional officer, the Attorney General has authority to make independent legal decisions, based on the public interest, regarding the representation of state agencies and boards. This authority distinguishes the relationship between the Attorney General and a client from the attorney-client relationship found in the private sector.

B. Structure of the Attorney General's Office

The Attorney General's Office is divided into four sections, each of which has several divisions. The Solicitor General and three Deputy Attorneys General each lead one section. Division managers and section deputies are responsible for managing divisions' day-to-day operations.

Many of the divisions have been created to serve the needs of particular agencies within state government. The Transportation Division, for example, provides legal representation to the Minnesota Department of Transportation. Other divisions exist to carry out special Attorney General responsibilities. For example, the Residential Utilities Division advocates for residents' and small businesses' interests with respect to utility issues. In these matters, the Attorney General is the party rather than a state agency.

C. Legal Representation of State Boards

State boards and board staff regularly seek legal advice on a variety of issues. Representation of non-health-related boards is largely consolidated in the office's Administrative Law Division while the Health and Teacher Licensing Division provides representation primarily to health-related boards. Other divisions throughout the office also represent some boards. When a matter proceeds to a contested case or a suspension proceeding, more than one attorney from the Attorney General's Office will become involved in the case. The first attorney will be the attorney for the board committee seeking action, while the second attorney will be the advising attorney for the board. The committee and advising attorney roles are discussed further in section IV.C of this manual.

III. LICENSING BOARD RESPONSIBILITIES

As administrative agencies, licensing boards have only those powers that the legislature gives them in statutes. Chapter 214 of the Minnesota Statutes and boards' individual practice acts are the principal statutes that define and limit a licensing board's powers and responsibilities. Licensing board duties fall into two major categories: (1) granting and denying licenses and certifications and (2) resolving complaints, which may include imposing discipline. A board's goals must always be to preserve the health, safety, and welfare of Minnesotans and to act in the public's best interest.

A. Licensure and Certification

Boards have authority to ensure that only qualified persons engage in particular professions. The legislature predetermined who is qualified for licensure by establishing licensure requirements in each board's governing statutes. While a board's disciplinary function is often discretionary, a board's licensing or certifying function is largely "ministerial" in nature. A ministerial act involves executing specific standards that allow for little interpretation by a board. The legislature determines the qualifications needed for a profession by establishing specific education and experience requirements. If those requirements are met, a board may not deny licensure or certification, except as set out below. In this way, the legislature mandates that boards license or certify particular persons and withhold approval from others.

Although licensing or certification is largely ministerial, a board typically can exercise some discretion in two areas. First, while statutes establish mandatory requirements for licensure or certification, most boards also have authority to adopt rules to implement the legislative standards. For example, even if a statute has a mandatory-examination requirement, the board has discretion to define in its rules the nature and scope of the examination or what constitutes a passing score.

Second, many boards' governing statutes require that applicants be of good moral character or that they have not engaged in conduct warranting disciplinary action. These types of requirements afford boards some discretion to decide how a statutory criterion applies to each

applicant. For example, if the evidence warrants, a board may deny a license to a person who has engaged in fraud under the board's equivalent of a "good moral character" requirement. Depending on the evidence in a particular case, a board's discretionary decision could range from restricting the scope of practice or requiring supervision of a licensee to less stringent conditions such as requiring additional educational courses.

B. Complaint Resolution

The second major licensing-board function is the complaint-resolution process. While most boards follow a similar process, outlined in parts B.1-B.5 below, the Peace Officer Standards and Training (POST) Board has unique statutory procedures, outlined in part B.6.

1. Initial handling of complaints

The complaint-resolution process begins when a licensing board receives a complaint. Most complaints consist of a statement of grievances or allegations against a licensee or certificate holder and a request for board intervention. Anyone may submit a complaint, including board members and staff, and complaints may be submitted orally or in writing. Minn. Stat. § 214.10, subd. 1. Before an oral complaint is resolved, the complaint must be put in writing or transcribed. Boards should also review their specific statutes and rules to ensure they follow any required board-specific process for memorializing a complaint. A licensing board generally has the authority to act on any complaint that is jurisdictional. A complaint is jurisdictional if it "alleges or implies a violation of a statute or rule which the board is empowered to enforce." *Id.* Jurisdictional determinations relate exclusively to whether a board has legal authority to act based on the alleged facts. Whether the allegations can be proven is irrelevant to the jurisdictional determination. If a complaint relates to matters within another agency's jurisdiction, the board must refer the complaint to that agency. *Id.*

Many licensing boards have established a complaint committee or panel that usually consists of one or more board members. This committee may make recommendations on how best to pursue a complaint. Options may include, for example, requesting the licensee's written response to the complaint, asking the complainant for additional information, referring the matter

to an outside consultant for expert advice, scheduling a disciplinary conference or educational meeting, or dismissing the complaint. A board member who has had a financial or professional relationship with the subject of a complaint may be prohibited from participating in complaint-committee activities involving that person. A more detailed discussion of conflict-of-interest issues is in section VII.E of this manual.

2. Investigating complaints

Each licensing board has developed procedures for investigating complaints. A non-health-licensing board's complaint committee can decide whether to obtain additional information regarding the complaint with the assistance of board staff and to consult with the Attorney General's Office if legal questions arise. *See id.* § 214.10, subd. 2. Health licensing boards are required to refer matters needing investigation to the Attorney General's Office. *Id.* § 214.103, subds. 4-5. Boards may sometimes want to hire an outside consultant to assist in investigating a particular complaint. If a board does this, the consultant should sign a nondisclosure agreement to ensure the privacy of data related to the active investigation of the complaint. Collecting, storing, and disseminating data during a board's investigation must be consistent with the Minnesota Government Data Practices Act ("MGDPA"), which is found in chapter 13 of the Minnesota Statutes. While this section briefly provides an overview of how the MGDPA affects complaint investigations, section VII.D of this manual provides a more detailed discussion of the MGDPA.

The MGDPA classifies a complainant's identity as private data unless the complainant consents to disclosure. *Id.*§ 13.41, subd. 2(a). A board therefore cannot disclose a complainant's identity to third parties without the complainant's written permission. Also, before an investigator interviews people or asks them for information related to the complaint, the investigator should give a warning commonly known as the Tennessen warning, which is discussed in more detail in section VII.D.2. In short, the investigator should give the warning to all witnesses and to other third persons from whom information is sought whenever a board asks individuals to provide private or confidential information about themselves. *Id.* § 13.04, subd. 2. The warning should explain the board's purpose and intended use of the information, whether the individual is required

to supply the information, any known consequences of giving or refusing to give the information, and the identity of other individuals or agencies authorized by law to receive the information. *Id.* In conjunction with this warning, it is a good idea to briefly describe the complaint-resolution process to the person from whom information is sought. Further, data collected and maintained as part of an active complaint against a licensee are classified as confidential under Minn. Stat. § 13.41, subd. 4. A board should take appropriate measures to protect the confidentiality of data it receives.

At the investigation stage, third parties are not legally required to provide requested information unless either the board subpoenas them or the board's statutes and rules require the disclosure. Licensing boards identified in chapter 214 can ultimately rely on the subpoena power granted in Minn. Stat. § 214.10, subd. 3, to obtain information relevant to a complaint. A board may enforce its subpoena in district court if the recipient does not respond.

After interviewing witnesses and reviewing acquired documents, an interview with the subject of the investigation may be required. That person may be contacted by telephone, in person, or by letter, and advised of the complaint. As with all persons interviewed, the licensee should receive the Tennessen warning and information concerning the complaint-resolution process. The licensee should also be informed that he or she may have an attorney present during the interview.

Members of health-related licensing boards, except the Board of Veterinary Medicine, should also be familiar with the special requirements found in Minn. Stat. § 214.10, subd. 8, for investigating, exchanging information, and handling complaints.

3. Conferences

For many boards, the disciplinary conference is the complaint committee's chief vehicle for resolving complaints. A conference may be held for the purposes of investigating, negotiating, educating, or conciliating. The committee notifies the licensee of the conference by serving a notice of conference that identifies the conduct alleged to violate the board's governing laws and provides information about the process. Generally, a licensee receives the notice about 30 days

before the conference, although this is not a statutory requirement. In emergency cases, the licensee may receive only a few days' notice.

Thorough conference preparation by the complaint committee's members and counsel is essential to accomplishing the conference's purpose. Preparation should include reviewing the notice of conference, any investigative data, the licensee's response to the allegations, and all other material relevant to the complaint. A licensee may be represented by an attorney at a disciplinary conference.

At the conference, the committee chair or the committee's attorney generally opens with a brief statement about procedural matters. A Tennessen warning should be given before anyone asks the licensee questions. The committee then questions the licensee about the allegations in the notice of conference. In addition to the committee members, board staff sometimes ask questions. Questioning should be relevant to the complaint's subject matter and help committee members develop a full understanding of the licensee's position on the allegations. This discussion should also allow the committee to assess the licensee's credibility, candor, and understanding of the relevant statutes and rules. Gathering this information permits the committee to decide how to proceed with the case. When highly technical issues are involved, the committee may hire an outside consultant to participate in the conference.

When the questioning is complete, the licensee is excused while the committee deliberates. The committee has a variety of options, including dismissing the complaint, continuing the matter to gather additional information, negotiating disciplinary action in a stipulation and consent order, or recommending that the board take certain disciplinary action and that a contested-case hearing be held to determine whether grounds exist for discipline.

Health-related licensing boards have the additional option of taking "corrective action." *Id.* § 214.103, subd. 6. Corrective action is intended to be used when the committee identifies problems that do not warrant disciplinary action or lack sufficient evidence to sustain disciplinary action. Corrective action is memorialized in a written agreement between the committee and the

licensee, and the committee dismisses the complaint when the licensee completes the corrective action.

4. Disciplinary action

While boards usually have discretion regarding whether to pursue discipline, that discretion is limited in some circumstances. For example, for persons convicted of certain crimes, the legislature requires boards to initiate contested-case proceedings to suspend or revoke a license, or to refuse to renew a license. *Id.* § 214.10, subd. 2a. As discussed above, disciplinary action may take a variety of forms, including reprimands or censures, license suspensions or revocations, and civil penalties. Boards may impose disciplinary action either through a consent order or through a final order following a contested case. A consent order is a form of settlement, issued after the full board reviews and approves a written stipulation setting forth facts and discipline to which both the complaint committee and the licensee have agreed. Contested cases are discussed more fully in section IV of this manual.

In some circumstances, licensing boards can also seek an injunction from a state district court. Boards can seek injunctive relief for two purposes: to restrain any unauthorized practice or conduct and to prevent a threatened violation of a statute or rule that the board has authority to enforce. *Id.* § 214.11. If an injunction is granted, the board can still pursue a disciplinary action with respect to the person's license or application for license or renewal. Obtaining an injunction also does not preclude an appropriate criminal prosecution of the person who has been enjoined, and boards should refer all potential criminal violations to the appropriate criminal authorities.

Many boards have specific authority to issue cease and desist orders. This type of order requires that a person stop engaging in conduct that violates a board's statutes or rules. A board must serve a cease and desist order on the person whose conduct is the subject of the order. The order must also contain language providing an opportunity to request a hearing before an administrative law judge ("ALJ") concerning the allegations in the order. If a hearing is not requested within 30 days, the order becomes final. The final order is public under the MGDPA. Violating a final order may form the basis for a board to seek injunctive relief in district court.

5. Temporary suspensions

Some boards can impose temporary suspensions. Temporary suspensions are reserved for cases in which a licensee's continued practice presents an immediate threat to the public. Each board with authority to temporarily suspend licenses may have slightly different procedures. In general, a board with this authority may temporarily suspend a license without a full trial-type hearing if it has probable cause to believe that the licensee violated a rule or statute that the board can enforce and that the licensee's continued practice would create a serious or imminent risk of harm to the public. The suspension specifies the rule or statute violated and is effective upon written notice to the licensee. The suspension remains in effect until the board issues a final order in the matter. When the board issues the suspension notice, it must start a disciplinary hearing within a specified period, often 30 days.

a. *Petition to full board*

When the complaint committee decides that a case warrants a temporary suspension, it must ask the full board to take this action. The committee usually makes the request through a petition for temporary suspension.

b. *Notice*

Because of the nature of temporary-suspension cases, the board generally acts quickly on the committee's petition. The board must make efforts to provide the licensee reasonable notice of the time, date, and place of the meeting at which the board will consider the petition. The committee serves the licensee with a copy of the materials that it will submit to the board and informs the licensee of the opportunity to present argument and information to the board regarding the proposed temporary suspension. The licensee or the licensee's attorney is also informed that questions regarding procedures to be followed should be raised with the board's advising attorney.

c. *Evidence*

Evidence in a temporary-suspension proceeding is usually presented in affidavit form only. The board typically does not hear live testimony.

d. *Board order*

Before the board meeting, the complaint committee submits a proposed order to the board and the licensee. After the meeting, the board decides whether to suspend the license. If the board suspends the license, it must schedule a contested-case hearing within a specified period. After the contested-case hearing, the ALJ will issue a report and recommendation, typically within 30 days after the hearing record closes. Some boards' statutes require the board to issue a final order within 30 days after receiving the ALJ's report and any exceptions to it.

The emergency nature of temporary-suspension proceedings may require that one or more of the above procedures be dispensed with in an unusual case. In exceptional cases, an ex parte proceeding (one in which the licensee does not participate) could be held involving the temporary suspension of the licensee's license.

6. POST Board complaint-resolution procedures

The law sets out a different procedure for the POST Board to review and resolve complaints. When the board's executive director or a member receives a complaint alleging a licensee violated the board's statutes or rules, the law allows the executive director to designate a law enforcement agency to investigate the complaint. *Id.* § 214.10, subd. 10. The law enforcement agency has 30 days to investigate and submit a written report to the executive director. *Id.* The board's complaint committee then meets to determine whether the allegations in the complaint provide reasonable grounds to believe a violation occurred. *Id.*, subd. 11.

At least 30 days before the committee's meeting, the executive director must give the licensee a copy of the complaint and give both the licensee and the complainant written notice of the meeting. The licensee and the complainant must both have a reasonable opportunity to be heard by the committee. *Id.* After considering all information it has, the committee may order an administrative hearing, determine that no further action is warranted, continue the matter, or

attempt to settle the matter through a consent order (subject to the full board's approval). *Id.*, subd. 11(b)(1)-(3). The executive director must promptly notify the complainant and the licensee of the committee's action. *Id.*

If the committee orders an administrative hearing, as with other boards, an ALJ makes a recommendation to the full board after the hearing and the board then makes the final decision. Before the board meets to consider the matter, however, the executive director must again notify the licensee and the complainant of the meeting. After the board makes its decision, the executive director must notify the licensee, the complainant, and the chief law enforcement officer of the licensee's employer. *Id.*, subd. 12.

IV. CONTESTED CASES

When a board committee believes that a licensing action is necessary and the licensee or license applicant does not agree, a contested-case proceeding is required. This involves a proceeding before an ALJ at the Office of Administrative Hearings, followed by the ALJ's recommendation to the board and the board's final decision. This section explains the contested-case process in more detail and the board's role in this process.

A. Adjudicative Functions of the Board

Whenever a board reviews a particular individual or business's conduct, makes factual determinations, and issues an order on the specific individual or business, the board acts in an adjudicative capacity, like a court. For example, when a licensee and a board's complaint committee cannot agree on the facts or the resolution of a licensing matter, a contested case becomes the method for resolving the dispute.

A contested case is a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Minn. Stat. § 14.02, subd. 3. Put another way, a contested case is a type of proceeding in which the board makes specific factual and legal determinations regarding a specific party. Thus, it differs from a rulemaking proceeding in which the board exercises its legislative authority to establish general standards for future conduct by all licensees and future board determinations.

For licensing boards, contested-case proceedings generally involve one of three situations:

a. The board denies a licensure or registration application because the applicant is unqualified or because the applicant's past conduct calls into question the applicant's ethical standards;

b. The board initiates a disciplinary hearing because of past or current conduct by a person already licensed or registered by the board; or

c. The board initiates a hearing because a person not licensed by or registered with the board is engaging in, or has engaged in, an activity requiring licensure or registration.

A non-licensing board may be required to initiate a contested case if the board's statute requires the process or if a constitutionally protected interest is involved. The following subsections describe the contested-case process in the context of a licensing board.

B. Steps in the Contested-Case Process

A contested-case proceeding involves multiple steps, beginning with either the complaint committee's decision to initiate the contested-case process or an applicant's request for a hearing on the committee's recommendation that the board deny a license application. The process potentially ends with review by an appellate court. The various steps in the process are briefly reviewed below.

1. Initiating a hearing

If, after investigation, a board committee or representative believes that a licensee or applicant has engaged in conduct warranting board action or is unqualified for licensure, a contested-cased hearing may be initiated. *Id.* § 214.10, subd. 2. Boards should consult their board-specific statutes and rules regarding the hearing process for license applicants, as the process can vary between boards. A hearing is initiated when the board's executive director issues a notice and order for a hearing or a prehearing conference.

After initiating a contested-case proceeding, a board may, by order, provide that the ALJ's report or order will constitute the final decision in the case. *Id.* § 14.57(a).

2. Agreement to arbitrate

As an alternative to initiating or continuing with a contested-case proceeding, the parties, with board approval, may enter a written agreement to submit the issues to arbitration by an ALJ. *Id.* § 14.57(b).

3. The hearing

A contested-case hearing is a formal trial-like proceeding before a judge without a jury. An ALJ appointed by the Office of Administrative Hearings presides over the hearing. Each ALJ is an attorney, independent from any state agency other than the Office of Administrative Hearings. In the hearing process, one party is the board's complaint committee, represented by the Attorney

General's Office. The person or business subject to the committee's proposed action is the other party. Each party has a right to present witnesses and documentary evidence, and to cross-examine any witnesses. The investigative file that the board's committee used in deciding whether to initiate the hearing does not become part of the hearing record unless it is introduced as evidence. Similarly, settlement discussions between the parties generally cannot be used as evidence. After the hearing, the ALJ issues a report to the board that has factual findings, legal conclusions, and a recommendation.

An evidentiary hearing is necessary only if adjudicative facts are disputed. If a board committee believes that the relevant facts are undisputed, it may bring a motion for summary disposition, which asks the ALJ to make a recommendation based on those facts. The other party will then have an opportunity to argue either that the facts are disputed and a hearing is necessary, or that the law does not support an adverse action based on those facts.

4. Board decision

The ALJ's report, a recording or transcript of the hearing testimony, all documentary evidence, and the parties' written arguments are submitted to the board after the hearing. The ALJ's report is only a recommendation to the board. Adversely affected parties must have a minimum of ten days to file "exceptions" or objections to the ALJ report. Minn. Stat. § 14.61, subd. 1. While not required, a board may also allow non-adversely affected parties to file exceptions. *In re Residential Bldg. Contractor License of LeMaster Restoration, Inc.*, No. A10-1700, 2011 WL 2437463, at *6 (Minn. Ct. App. June 20, 2011). The contested-case record must close upon either the filing of any exceptions to the ALJ report and presentation of argument or the expiration of the time allowed for submitting exceptions and arguments. The board shall notify the parties and the presiding ALJ of the date when the hearing record is closed. Minn. Stat. § 14.61, subd. 2.

After receiving the ALJ's report, the board must review the report and the hearing record. In most cases, each board member should review the ALJ report and the entire record. Reviewing the record also includes reviewing any exceptions submitted by the parties. Failing to adequately

review the record can lead to reversal on appeal. For example, the U.S. Supreme Court held that the decision-making process was defective when an agency head consulted only with agency employees, did not review any evidence or briefs, and did not hear the oral arguments. *Morgan v. United States*, 298 U.S. 468, 481-82 (1936). In contrast, the Minnesota Supreme Court held that an agency head adequately reviewed the record before making a final decision when he thoroughly reviewed the record:

> [T]he commissioner made an informed decision, after adequate consideration of the voluminous evidence submitted at the hearing. He spent about ten hours personally studying the record. The commissioner reviewed the entire transcript "reading verbatim those areas of testimony which (he) felt were of substance or were in dispute," and examined every exhibit submitted at the hearing. In addition, he received a four-or-five-hour briefing from his staff, which consisted of a review of the evidence and the arguments made by the parties.

Urban Council on Mobility v. Minn. Dep't of Nat. Res., 289 N.W.2d 729, 736 (Minn. 1980).

Each licensing board generally schedules a specific time following review of the record for the parties or their attorneys to present oral argument. The board is not bound by the ALJ's report and must make its own determination. Once the board determines the facts of the case and decides that a person violated the board's statute or rules, it must decide what action, if any, to order. The board must consider any factors explicitly required by statute or rule. *In re Maltreatment Determination of Restorff*, 932 N.W.2d 12, 23-24 (Minn. 2019). The board's final decision and order must be in writing, be based on the record, and include factual findings and legal conclusions on all material issues. Minn. Stat. § 14.62, subd. 1. If the board rejects or modifies an ALJ's finding or, conclusion, or recommendation, it must include the reasons for each rejection or modification. *Id.* The board must base any modification or rejection of the report on evidence in the hearing record. Failing to adequately explain the reasons for rejecting an ALJ's findings or conclusions may result in a court reversing the decision. *See In re Appeal by Waters of Maltreatment Determination & Disqualification*, No. A21-1119, 2022 WL 2297524, at *9 (Minn. Ct. App. June 27, 2022) (reversing when commissioner adopted ALJ's findings but did not adequately explain departure from ALJ's conclusions); *see also In re Issuance of Air Emissions Permit No. 13700345-*

101 for PolyMet Mining, Inc, 965 N.W.2d 1, 11 (Minn. Ct. App. 2021) (holding that substantial evidence did not support agency decision when agency did not adequately explain its conclusions).

The board should reach its decision at a formal meeting following discussion by all board members eligible to vote on the matter. The decision should not be reached through meetings or telephone calls involving only two or three board members at a time. The board's advising attorney generally should be present. These board deliberations are typically conducted in a closed portion of an official board meeting. To avoid any appearance of impropriety, members of the complaint committee and any board staff involved in the case should not be present. *In re Application of Baker*, 907 N.W.2d 208, 213 (Minn. Ct. App. 2018) (holding that, while committee and staff members' presence did not violate applicant's due-process rights or establish bias, their presence could create appearance of impropriety that would thwart public's trust in administration of justice).

5. Timing for final board action

In most circumstances, a board must issue its decision within 90 days after the record of the proceedings closes, although some boards may have a shorter time established by law. Minn. Stat. § 14.62, subd. 2a. If the board fails to announce the date that the record closes under Minn. Stat. § 14.61, subd. 2, the court may determine the date the record closed. *See In re Cich*, No. A08-0596, 2008 WL 4909757, at *2 (Minn. Ct. App. Nov. 18, 2008) (determining that record closed when parties filed additional memoranda for board's consideration as agreed during arguments before board). When a board fails to act within 90 days, the ALJ's decision becomes final. If the case involves a licensing action and the board fails to act, the board must return the record to the ALJ for consideration of disciplinary action. Minn. Stat. § 14.62, subd. 2a.

A decision may be required in less than 90 days in some circumstances. For example, when there is a written request relating to zoning or other matters under Minn. Stat. § 15.99, the board must affirm or deny the request within 60 days after the record closes, unless the board grants itself an extension. Minn. Stat. § 15.99, subd. 3(f). If the board fails to act within the 60-day period, the request will be approved regardless of the ALJ's recommendation. *See In re Hubbard ex rel. City*

of Lakeland, No. A07-1932, 2008 WL 5136099, at *4 (Minn. Ct. App. Dec. 9, 2008), *aff'd on other grounds*, 778 N.W.2d 313 (Minn. 2010). Similarly, a board has 60 days after it determines that a license application is complete to grant or deny the application. If the board does not act within that time, the application is deemed granted. Minn. Stat. § 15.992.

6. Public decision

A board order involving a licensee is public under the MGDPA regardless of whether the board takes disciplinary action. Minn. Stat. § 13.41, subd. 5. A licensing board may release confidential or nonpublic data collected as part of an active investigation for commencing a civil action only in narrow circumstances, such as when failing to do so would likely create a clear and present danger to public health or safety. *Id.*, subd. 6; *see also id.* § 13.39, subds. 1, 2(a) (authorizing disclosure of data collected as part of active investigation if government entity determines access to data will aid law enforcement, promote public health or safety, or dispel widespread rumor or unrest). For example, a court has held that, to promote health and safety, a board could publish on its website a temporary suspension order that contained data otherwise classified as confidential. *Uckun v. Minn. State Bd. of Med. Prac.*, 733 N.W.2d 778, 788 (Minn. Ct. App. 2007).

7. Judicial review

Board decisions are subject to judicial review when the person or business subject to the decision disagrees with it. Because the board decision represents the final action on behalf of the board, a board committee cannot seek review of the decision if it disagrees with the outcome. Familiarity with how a court will review a board's factual and legal decisions will help board members understand the limits on their decision-making authority.

a. Decisions based on the official record before the board

A board's decision can be challenged in an appeal to the Minnesota Court of Appeals on multiple grounds, including that the decision is arbitrary and capricious. Minn. Stat. § 14.69. A decision is arbitrary and capricious "if it represents the agency's will and not its judgment." *In re Petition of N. States Power Gas Util.*, 519 N.W.2d 921, 924 (Minn. Ct. App. 1994). "Will" is the

desire to achieve a certain result but without factual support. "Judgment" occurs when the board desires to achieve a certain result and has facts to support the conclusions. A board ruling is arbitrary and capricious if the board relied on factors that the legislature did not intend, failed to consider an important aspect of the problem, gave an explanation unsupported by the evidence, or rendered a decision "so implausible that it cannot be explained as a difference in view or a result of the agency's expertise." *Id.* at 924-25. Board members should therefore always base their decisions on the facts in the official record before them.

b. *Judicial deference to the board*

A reviewing court will usually give some weight to a board on technical issues within the board's area of expertise. For example, a board's decision that a machine does not meet the technical parameters set forth in board rules will usually receive deference. But a board's decision that a licensee did not properly deliver a document to the board will probably not. A court will likely apply more scrutiny to an issue that either falls outside an area of board expertise or presents a legal question of procedure or statutory interpretation. Nevertheless, sometimes a reviewing court gives great weight to a board's long-standing interpretation of a statute or rule, especially if the legislature has not acted to overturn that interpretation.

C. Committee and Advising Attorneys

When the board's complaint committee decides to initiate a contested-case or temporary-suspension proceeding, the committee presents and advocates a case supporting its position. As an advocate, the attorney representing the committee may not advise the full board when it assumes its quasi-judicial role as the final decision-maker in a contested case. But the full board will need an attorney to advise it on legal issues that arise. The attorney advising the board at the decision stage of the contested-case process must not have been involved in representing the committee before the ALJ. The Attorney General's Office has therefore created separate roles for attorneys advising boards and attorneys representing committees in contested cases.

When the attorney for the complaint committee identifies a good probability that the matter he or she is working on will proceed to a contested-case hearing, an advising attorney is assigned

for the full board unless the board already has a standing advisor assigned. Some boards have standing advising attorneys because of the boards' large volume of cases, while others will have an attorney assigned as needed. Upon designating an advising attorney, all other division attorneys and board staff are notified of the assignment. The advising attorney is then isolated from the committee's advancement of the case.

Until the case goes to the board for a decision, the advising attorney does not review any of the case files and avoids discussing the matter with the committee attorney and any individuals with knowledge of the case. Once the case is referred to the board, the advising attorney reviews the record. At that point, while the advising attorney may meet with the deliberating board members and discuss the case with them, the advising attorney continues to refrain from discussing the case's factual and legal issues with any person who has been involved in the hearing or investigation, including the executive director, committee members, or board staff. The advising attorney may, however, discuss administrative and procedural matters with board staff. The advising attorney typically assists the board in drafting the decision and will provide the board with advice about any legal issues or other matters involved in the case. Once the board issues its decision, the advising attorney also advises the board in connection with any request that the board reconsider its decision, stay it pending appeal, or waive a bond.

D. Disqualification of Board Members

Some board members may be prohibited from participating in board decisions on particular matters. For example, any board member who was consulted during an investigation may not deliberate or vote on any matter pertaining to the case when it goes before the board following a formal contested-case proceeding. *See, e.g.*, Minn. Stat. §§ 214.10, subd. 2, 214.103, subd. 7. Complaint committee members, and board staff who were involved in investigating the complaint and pursuing the disciplinary action, should not be present during the board's deliberation to avoid even the appearance of impropriety. *Baker*, 907 N.W.2d at 213.

A board member's personal familiarity with the person subject to the contested case should also be considered when deciding whether the member should be disqualified from participating

in the final board decision. Familiarity with the person who is the subject of the proceedings does not inherently disqualify a board member. In general, board members should disqualify themselves if their familiarity with the person will affect their ability to render a fair and impartial decision. With regard to health-related licensing boards, "a board member who has a direct, current or former financial connection or professional relationship to a person who is the subject of board disciplinary activities must not participate in board activities relating to that case." Minn. Stat. § 214.10, subd. 8(b). Note that this prohibition prevents participating in any board activities relating to a case in which the conflict is presented. Thus, a board member with a conflict may not participate as either a complaint committee member or as a board member in issuing a final decision. For further information regarding conflicts of interest, see section VII.E.1 of this manual.

V. THE ROLE OF BOARD MEMBERS IN HEARINGS

Boards make decisions that may significantly affect licensees or license applicants and their ability to make a living in their chosen professions. Boards may further impose sanctions on unlicensed individuals that significantly impact them. When exercising quasi-judicial authority, board members must take their role seriously and hold themselves to high standards in deliberating and reaching decisions. This involves acting with a judicial demeanor, treating people fairly and consistently, and approaching each case objectively and with an open mind.

A. Judicial Demeanor

Board members act in a quasi-judicial capacity when serving as the final decision-maker over a particular set of facts. It is important that board members act in a manner that generates respect from those who appear before them and instills confidence in the decision-making process.

Judges follow the code of judicial conduct and must be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, spectators, and staff. Board members acting in a quasi-judicial capacity should demonstrate the same patience, dignity, and courtesy that a judge would. Remember that it is the advocate's job to make the best and most persuasive argument he or she can for the position desired. Although board members may disagree with the position advocated, they should not try to discourage the position by being discourteous, making belittling statements, or being excessively argumentative.

B. Fairness and Consistency

A board member in a quasi-judicial role should treat, and be perceived as treating, all who appear in front of the board fairly and consistently. Consistency helps regulated individuals and the public predict how the board will likely view a certain situation. But a board should not blindly follow its previous decisions on a particular topic. If the facts of a contested case materially differ from a previous case, the board does not always have to follow its prior decision. Consistency does not mean that a board cannot change its position or interpretation of a law, but a board may have to engage in formal rulemaking to adopt a new interpretation if the new position will be generally applicable to the public in the future. *See, e.g.*, *In re PERA Salary Determinations Affecting Retired*

& Active Emps. of City of Duluth, 820 N.W.2d 563, 571 (Minn. Ct. App. 2012) (noting circumstances in which unpromulgated interpretive rule would be invalid); *see also In re Schmalz*, 945 N.W.2d 46, 54-55 (Minn. 2020) (holding that agency was not bound by its prior incorrect interpretation of law).

C. Objectivity

Board members acting in a quasi-judicial capacity must remain objective. Before voting on any matter before the board, board members must carefully listen to oral arguments and review the record, including any written exceptions and the ALJ's report. This will help to ensure that the board makes informed and impartial decisions.

Objectivity, or the perception of objectivity, is threatened by ex parte communications, which are communications between a decision-maker and only one party to a pending matter without the other party's knowledge or consent. For example, in the context of a disciplinary proceeding, decision-making board members cannot communicate about a case with members of the complaint committee unless the other party is also present. Further, although the Open Meeting Law does not apply to board deliberations in a contested-case proceeding, adhering to some of its principles can preserve the integrity of the decision-making process and maximize the perception of objectivity. It is therefore a best practice to not discuss the matter currently before the board with anyone, even other members of the board, outside the forum for adjudication.

Finally, a board member should not participate as a decision-maker in any matter that implicates a conflict of interest or potential bias by the member. For more information about conflicts of interest, see section VII.E.1 of this manual.

VI. RULEMAKING

A board's authority to adopt, amend, and repeal rules is one of the most important tools for refining and implementing the public policy that the legislature set for the state. This section of the manual is designed to familiarize board members with the concept of rulemaking and to provide practical information about their role in rulemaking.

A. Rulemaking Overview

Rulemaking is often described as a quasi-legislative function. It is the part of the administrative process by an executive-branch agency that resembles a legislature's enactment of a statute. A "rule" is "every agency statement of *general applicability and future effect*, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure." Minn. Stat. § 14.02, subd. 4 (emphasis added).

Administrative rules are legally binding and have the force and effect of law within the state. Rules are typically directed to a particular group of people, and a board's rules regulate only those subject to its jurisdiction. As discussed in more detail below, a board generally cannot adopt rules until an ALJ has reviewed them for reasonableness, necessity, and legality.

B. Statutory Authority

Under the Minnesota Constitution, the legislature has the power to establish state policy. But the legislature may delegate its lawmaking authority to agencies and boards to make more specific directives to implement that policy, so long as the legislature gives the agencies and boards reasonably clear standards to guide their actions. When a board adopts rules, it exercises the power that the legislature delegated to it. A board cannot adopt rules on a given subject unless a statute grants it rulemaking authority for that subject. Nor can a board adopt a rule that exceeds the scope of, or conflicts with, the authority granted by the legislature.

C. Basic Rulemaking Procedures

Rulemaking is a lengthy and involved process. Drafting rules is only the first of many steps that a board must follow before rules take effect. This section does not attempt to explain the

intricate procedures involved in rulemaking and instead provides a general overview of the process. For a more in-depth analysis, a detailed rulemaking guide by the Office of the Revisor of Statutes is available at *revisor.mn.gov/static/office/pubs/2018_all_rulemaking_guide.pdf*. That office has prepared a drafting manual with style and form tips, available at *revisor.mn.gov/static/office/1997_RuleDraftManual.a285c37112da.pdf*. Another helpful manual, prepared by the Minnesota Department of Health, that addresses rulemaking is available at *health.state.mn.us/data/rules/manual/docs/manual2020.pdf*.

The Administrative Procedure Act ("APA") establishes two main procedures for adopting rules: (1) procedures for *controversial* rules, Minn. Stat. §§ 14.131-.20; and (2) procedures for *non-controversial* rules, Minn. Stat. §§ 14.22-.28. The APA also contains general requirements for all rules, Minn. Stat. §§ 14.05-.128; a procedure for adopting rules under an exemption from rulemaking requirements for good cause, such as an immediate threat to public health or welfare, Minn. Stat. § 14.388; an expedited procedure to repeal obsolete rules, Minn. Stat. § 14.3895; and a more general expedited procedure that requires legislative authorization, Minn. Stat. § 14.389.

The primary difference between controversial and non-controversial rulemaking procedures is that controversial rules require a public hearing before an ALJ. A proposed rule is considered controversial if twenty-five or more people request a hearing on it. Interested persons who support or oppose the proposed rule may appear and testify at the hearing and submit written comments before, during, and after the hearing. The ALJ then recommends whether the board should adopt, modify, or withdraw the proposed rules. After considering the ALJ's recommendation, the board decides whether to adopt the proposed rule. If the board modifies any part of a proposed rule, it must return the adopted rule to the Chief ALJ, who reviews the legality of the modification, including whether the modified rule is substantially different from the original proposed rule. *Id.* § 14.16, subd. 1. Non-controversial rules may be adopted without a hearing after a period for written comments by the public, but an ALJ must still approve these rules before they may be adopted. *Id.* § 14.26.

A board need not determine whether a proposed rule is controversial or non-controversial at the outset. The board may publish a "dual notice" that satisfies both the controversial and non-controversial proposed rule notice requirements. *Id.* §14.22, subd. 2. The board may then cancel the scheduled hearing if it receives fewer than 25 hearing requests and proceed with the non-controversial-rule process. *Id.*

Excluding the time for drafting the rules, which may take many months, the series of steps involved in rulemaking typically require a minimum of six to nine months, depending on whether the rules are controversial.[1] It is realistic to expect non-controversial rule procedures to take about nine months. Controversial rule procedures may take twelve months or longer because of the public hearing and additional review requirements involved.

D. Major Rulemaking Responsibilities of Board Members

A board cannot adopt rules unless it establishes that the proposed rules are both needed and reasonable. Proposed rules must be rationally related to a legitimate public purpose. *Mfd. Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 243 (Minn. 1984). Board members' first major responsibility is analyzing existing regulations, deciding the goals of the anticipated rulemaking, and then drafting the proposed rules. These can be difficult and time-consuming tasks. Rules must be drafted to accomplish the board's intent and be clear enough to be understood by the public and those administering the rules. Before even officially proposing rules, a board must also solicit and consider comments from the public about the subject of its possible rulemaking proposal. Minn. Stat. § 14.101, subd. 1.

Board members' next responsibility is to draft the statement of need and reasonableness (commonly called the "SONAR") for the proposed rules. The SONAR must address the following statutory factors: (1) who the proposed rule will affect, including both who will benefit and who

[1] These steps include soliciting outside comment from affected persons before drafting rules; drafting rules and a statement of need and reasonableness; publishing and mailing various notices; receiving outside comment on draft rules, including at a public hearing in some cases; and submitting the rules for review and approval by the Revisor of Statutes, the Governor's Office, and an ALJ at various stages and, in certain cases, the Chief ALJ and legislative bodies.

will bear its costs; (2) the board's probable implementation and enforcement costs; (3) whether less costly or intrusive methods exist to achieve the proposed rule's purpose, including alternatives that the board considered and the reasons the board rejected them; (4) an estimate of the probable costs to comply with the proposed rules; (5) the probable costs or consequences of not adopting the proposed rules; (6) a comparison of the proposed rules and any existing federal regulations; and (7) an assessment of the cumulative effect of the proposed rules with any other applicable regulation. *Id.* § 14.131. The board must also consult with Minnesota Management and Budget to evaluate the proposed rule's fiscal impact on, and the benefits to, local governments. *Id.* The overarching purpose of the SONAR is to summarize an agency's evidence and rationale that support a proposed rule. *Builders Ass'n of Twin Cities v. Bd. of Elec.*, 965 N.W.2d 350, 359 (Minn. Ct. App. 2021). While a board must sufficiently address the statutory factors, it need not address every possible hypothetical situation that could arise under the proposed rule. *Id.* Rather, it must give fair notice that affords interested parties a meaningful opportunity to participate in the rulemaking process. *Id.* at 361.

The board must make the SONAR publicly available either when it publishes notice of its intent to adopt rules without a hearing, or at least 30 days before the noticed hearing. *Id.* §§ 14.131, .23. Even if an ALJ ultimately approves the rules, the governor may veto all or a severable portion of the rules and the legislature may also advise against adoption of a rule. *Id.* §§ 14.05, subd. 6, .126. Once adopted, rules generally remain effective until the board repeals or modifies them in another rulemaking proceeding or an appellate court declares them invalid under Minn. Stat. §§ 14.44-.45. With some exceptions, if a board or ALJ determines that the cost of complying with the proposed rules exceeds a certain threshold, the rules will not take effect with respect to certain small businesses and small cities until they are approved by a law enacted after the board adopts the rules. *Id.* § 14.127.

The elected governing body of any statutory or home-rule city, county, or sanitary district may petition a board to amend or repeal all or part of a rule. Within 30 days of receiving a petition, a board must reply in writing and state that the board either (a) intends to adopt the requested

amendment or repeal; or (b) does not intend to and has requested that the Office of Administrative Hearings review the petition. *Id.* § 14.091. Any other person may also request adoption, amendment, or repeal of a rule, and the agency must respond within 60 days regarding its intentions. *Id.* § 14.09.

Even if the legislature exempts a board from following the APA's general rulemaking process for a specific rule, the board must generally still follow certain procedures for its rule to have the force and effect of law. *See, e.g.*, *id.* §§ 14.386, .388. With certain important exceptions, rules adopted under these procedures are effective for only two years.

E. Variances From Rules

A lawfully adopted rule binds all persons subject to the board's jurisdiction. To avoid unfair results, however, the legislature created a procedure that allows any person to petition the board for a variance from an adopted rule as it applies to that person.

A board *must* grant a variance if it finds that applying the rule to the petitioner's circumstances would not serve any of the rule's purposes. A board *may* grant a variance if it finds that: (1) applying the rule to the petitioner would result in hardship or injustice; (2) the variance would be consistent with the public interest; and (3) the variance would not prejudice any person or entity's substantial legal or economic rights. *Id.* § 14.055. When granting a variance request, a board may attach conditions to the variance as necessary to protect public health or safety, or the environment. A variance may only have a prospective effect, and a board can grant a variance only from a rule; a board cannot grant a variance from a statute or court order. *Id.*, subd. 2.

A board generally must issue a written order granting or denying a variance within 60 days after receiving the completed petition, unless the petitioner agrees to a later date. Failing to act on a petition within 60 days constitutes approval of the petition. Minn. Stat. § 14.056, subd. 5. A board must maintain for public inspection an index of its orders granting or denying variances. *Id.*, subd. 7.

VII. SPECIAL STATUTES THAT AFFECT BOARDS

Boards, board members, and board staff are subject to various laws that affect board operations and challenges to board conduct. Some key provisions are discussed below, such as those governing members' meeting attendance, when and how a board conducts business, how the board handles data, conflicts of interest and other ethical considerations, and the consequences for acting without a substantially justified basis.

A. Removal For Missing Meetings

A board member may be removed after missing three consecutive board meetings. Minn. Stat. §§ 15.0575, subd. 4, 15.059, subd. 4, 15A.0825, subd. 5, 214.09, subd. 4. After a board member misses two consecutive meetings, the board's secretary must notify the member in writing that missing a third meeting may result in removal. If the member then misses a third consecutive meeting, the board chair must inform the board's appointing authority (usually the governor).

B. Open Meeting Law

State law governs when, where, and how boards conduct business. As discussed below, the Open Meeting Law generally requires that board conduct most business in public.

1. What is the Open Meeting Law?

The Open Meeting Law requires that, except as otherwise expressly provided by law, all state board meetings, including executive sessions and committee and subcommittee meetings, be open to the public. Minn. Stat. ch. 13D. The Open Meeting Law does not apply to meetings at which a board exercises quasi-judicial functions involving disciplinary proceedings, including complaint-committee meetings. *Id.* § 13D.01, subd. 2(2). The purposes of the Open Meeting Law are to prohibit actions from being taken at secret meetings, to assure the public's right to be informed about board decisions, and to give the public an opportunity to present its views to the board. *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 4 (Minn. 1983).

2. What constitutes a meeting?

The Open Meeting Law has been broadly construed in favor of the public. All gatherings of at least a quorum of a board, committee, or subcommittee at which members discuss, decide, or

receive information as a group on issues related to a board's official business are "meetings" subject to the act. *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 518 (Minn. 1983).

Although the Open Meeting Law generally does not apply to communications among less than quorum, discussion and persuasion among small groups of members may still be improper when designed to avoid public discussions, to forge a majority on an issue before public hearings, or to hide improper influences, such as a public official's personal or pecuniary interest. *Id.* at 517-18. Further, while purely social gatherings are not subject to the Open Meeting Law, a quorum of board members may not discuss or receive information on official business in any setting unless they comply with open-meeting requirements. Even a short discussion by a quorum outside a meeting room constitutes a violation subjecting board members to monetary sanctions. For example, when a mayor and enough council members to constitute a quorum of a planning commission left a commission meeting for eight minutes to discuss a contract matter, Minnesota courts held that the mayor and council members violated the Open Meeting Law, were subject to monetary sanctions, and were not entitled to reimbursement from the city or its insurer for the cost of defending the lawsuit related to their violations. *Kroschel v. City of Afton*, 524 N.W.2d 719, 720-21 (Minn. 1994); *Kroschel v. City of Afton*, 512 N.W.2d 351, 356 (Minn. Ct. App. 1994); *Thuma v. Kroschel*, 506 N.W.2d 14, 19, 22 (Minn. Ct. App. 1993).

Informational seminars that include discussions about board business, attended by the whole board, must be publicized and open. Whether board members take official action or make decisions is irrelevant. If a board receives information and holds discussions that could foreseeably influence later board decisions, the Open Meeting Law applies. *St. Cloud Newspapers*, 332 N.W.2d at 1, 6. But training sessions designed to improve trust, relationships, communications, and problem-solving among board members are not subject to the Open Meeting Law if the board does not discuss, decide, or receive information relating to the board's official business. Minn. Dep't of Admin., Advisory Op. No. 16-006 (Nov. 4, 2016).

The Open Meeting Law also applies to mail, e-mail, or other remote exchanges between a quorum of members about official business. Minn. Dep't of Admin., Advisory Op. No. 09-020

(Sept. 8, 2009) (holding board violated law by exchanging emails approving response to forthcoming newspaper editorial). One-way communication between a board chair or staff and members, however, is permissible so long as no discussion or decision-making ensues. Further, staff or third parties should not act as members' go-betweens or conduct serial solicitations between a quorum of members regarding official business outside of a public meeting. Minn. Dep't of Admin., Advisory Op. No. 17-005 (June 22, 2017) (concluding that school board violated law when quorum of members separately agreed to letter superintendent distributed to them individually); Minn. Dep't of Admin., Advisory Op. No. 06-017 (May 25, 2006) (concluding that law would be violated if quorum of city council members separately called city administrator with instructions to hire job candidate). As a result, board members should avoid engaging in e-mail and other exchanges involving a quorum of board members, either directly or through others. A best practice is to not use "reply to all" when responding to an e-mail sent to more than one board member. Using social media does not violate the Open Meeting Law so long as a board member limits social-media use to exchanges with all members of the public. Minn. Stat. § 13D.065.

3. Requirements at open meetings

At open meetings, a board must record its members' individual votes on any action taken (whether by the full board, committee, or subcommittee) in a journal or meeting minutes, except for votes to pay judgments, claims, or amounts fixed by law. *Id.* § 13D.01, subd. 4; Minn. Dep't of Admin., Advisory Op. No. 21-001 (Jan. 3, 2021), *abrogated in part by statute*. The board's journal or minutes must be open to the public during all normal business hours where the board's records are kept. Minn. Stat. § 13D.01, subd. 5. Posting the journal or minutes online is insufficient. Minn. Dep't of Admin., Advisory Op. No. 22-002 (Mar. 22, 2022).

In any open meeting, at least one copy of any printed materials relating to the meeting's agenda items that are distributed to board members or otherwise available to all board members in the meeting room, must also be available in the meeting room for the public to inspect while the board considers the materials' subject matter. Minn. Stat. § 13D.01, subd. 6. The public's copy must be identical to the board members', and the board should notify the public that the materials

are available. Minn. Dep't of Admin., Adv. Op. No. 18-003 (Apr. 5, 2018). But the copy requirement does not apply to materials classified as not public by the MGDPA or to materials relating to the agenda items of a meeting permitted to be closed. Minn. Stat. § 13D.01, subd. 6(b). If the board materials contain both public and not public data, the board must make the public data available by redacting the not public data. Minn. Dep't of Admin., Advisory Op. 21-001.

Although it is generally good practice to do so, the Open Meeting Law does not require: (1) that a board follow Roberts Rules of Order or other parliamentary procedures; (2) that the public be permitted to speak at meetings; or (3) that meeting minutes be prepared (although the Official Records Act, Minn. Stat. § 15.17, separately requires public bodies to make and preserve all records necessary to a full and accurate knowledge of its official activities). While not required by the Open Meeting Law, boards should be mindful to follow any additional meeting requirements the board may have adopted in its bylaws.

4. Meetings by telephone or interactive technology

State boards may conduct meetings subject to the Open Meeting Law by telephone or interactive technology if (1) members participating in the meeting can hear each other and all discussion; (2) members of the public at the board's regular meeting location can hear all discussion and votes; (3) at least one board member is physically present at the regular meeting location; and (4) all votes are conducted by a roll call. Minn. Stat. § 13D.015. Each member participating by telephone or interactive technology is considered present for determining a quorum and participating in the meeting. *Id.*, subd. 3. "Interactive technology" refers to a device or application that allows individuals in different locations to see and hear one another, such as WebEx, Microsoft Teams, or Zoom. *Id.* § 13D.001, subd. 2.

If the board uses a telephone or interactive technology to conduct a meeting, the board must, to the extent practical, allow the public to monitor the meeting electronically from a remote location. *Id.*, § 13D.015, subd. 4. The board must also provide notice of the meeting location, of the fact that some members may participate by interactive technology, and of the public's right to monitor the meeting electronically from a remote location. *Id.*, subd. 5. Additionally, the board

must post the meeting notice on its website at least 10 days before any regular meeting. *Id.* For example, the board give notify the public that interactive technology will be used by posting language like

> Some board members may attend the meeting by telephone or via interactive technology. Members of the public may attend the meeting either at the board's regular meeting location or by [telephone number or name of platform with link and access instructions]. Public participants will be able to listen to board members' discussions, hear board votes, and, at the chair's discretion, offer public comment.

5. Meetings during a pandemic or emergency declaration

To provide additional flexibility, when certain conditions are met boards may conduct fully remote open meetings by telephone or interactive technology during a health pandemic or emergency declared under chapter 12 of the Minnesota Statutes. Minn. Stat. § 13D.021. To hold a meeting under § 13D.021, the presiding officer, chief legal counsel, or chief administrative officer must first determine that an in-person meeting or meeting conducted under 13D.015 is not practical or prudent because of a health pandemic or emergency declaration.

In addition to that initial determination, if a board conducts a meeting under this provision: (1) all members must be able to hear each other and all discussion and testimony; (2) members of the public at the regular meeting location must be able to hear all discussion, testimony, and votes, unless being in person is not feasible due to the pandemic or emergency declaration; (3) at least one member, the chief legal counsel, or chief administrative officer must be physically present at the regular meeting location, unless unfeasible due to the pandemic or emergency declaration; and (4) all votes must be conducted by roll call. *Id.*, subd. 1. Also, if the board typically offers a public comment period at in-person meetings, the public must be permitted to comment from a remote location during the public comment period, to the extent practical. *Id.*, subd. 5.

If a board meets under § 13D.021, it must, to the extent practical, allow a person to monitor the meeting electronically from a remote location. *Id.*, subd. 3. The board must also provide notice of the regular meeting location, of the fact that some members may participate by telephone or interactive technology, and of the public's right to monitor the meeting electronically from a

remote location. *Id.*, subd. 4. The timing and method of notice is governed under the notice provisions discussed below.

Conducting a meeting under Minn. Stat. § 13D.021 is inappropriate if a quorum of the board will be physically present at the regular meeting location because an in-person meeting is then practical and prudent. Likewise, limiting the public to remote attendance when a board quorum is in person at the regular location violates the Open Meeting Law. Minn. Dep't of Admin., Advisory Op. No. 21-003 (Apr. 19, 2021).

6. Public notice of meetings

When a board meets, the Open Meeting Law requires notice to the public. The following sections address the notice required for different types of meetings.

a. *Regular meetings*

A state board must keep on file at its offices, or post on its website, a schedule of all regular meetings. Minn. Stat. § 13D.04, subd. 6(3). If a regular meeting is held at a different time or place, the board must provide the same notice that the board must provide for special meetings. *Id.*, subd. 1. Starting a meeting earlier than the noticed time or conducting a meeting without the proper notice violates the Open Meeting Law. *Merz v. Leitch*, 342 N.W.2d 141, 145-46 (Minn. 1984) (finding violation when board started meeting thirty minutes early). A board also cannot hold a meeting at a location outside the territorial confines of the board's jurisdiction. *Quast v. Knutson*, 150 N.W.2d 199, 200 (Minn. 1967); Minn. Dep't of Admin., Advisory Op. No. 18-003 (Apr. 5, 2018). This means that boards must meet in Minnesota. Minn. Dep't of Admin., Advisory Op. No. 08-034 (Dec. 3, 2008).

b. *Special meetings*

For special meetings, except emergency meetings or special meetings for which a separate statutory procedure governs notice, the board must post a written notice with the date, time, place, and meeting purpose on the board's bulletin board (which must be accessible to the public) or on the door of its usual meeting room. Minn. Stat. § 13D.04, subd. 2(a); *Rupp v. Mayasich*, 533 N.W.2d 893, 895 (Minn. Ct. App. 1995). In stating the meeting's purpose, the notice must

adequately describe the topics that will be discussed. The board must then limit its discussion to the noticed topics. Minn. Dep't of Admin., Advisory Op. No. 19-006 (Apr. 9, 2019). The board must also mail or otherwise deliver notice to each person who has filed a written request for notice of special meetings. Minn. Stat. § 13D.04, subd. 2(b). Notices of special meetings must be posted, mailed, or delivered at least three days before the meeting. *Id.* Instead of mailing or personally delivering notice of special meetings, a board may publish the notice in the State Register or on the board's website at least three days before the meeting. *Id.*, subds. 2(c), 6(2). Presently the State Register is published each Monday (or Tuesday, if Monday is a holiday), and it generally requires that notices for publication be submitted by noon on the Tuesday before the publication date.

c. *Emergency meetings*

An emergency meeting is a special meeting called under circumstances that, in the board's judgment, require its immediate consideration and cannot wait the three days required to give notice of a special meeting. Minn. Dep't of Admin., Advisory Op. 04-004 (Feb. 3, 2004). For emergency meetings, in addition to notifying all board members of the meeting, boards must make good-faith efforts to notify each news medium that filed a written request for such notice. *Id.*, subd. 3(a)-(c). The notice must include the subject of the meeting. *Id.*, subd. 3(d). Posted or published notice is not required. *Id.* If the board discusses or acts on matters not directly related to the emergency, the minutes of the emergency meeting must include a specific description of those matters. *Id.*, subd. 3(f).

d. *Recessed meetings*

For recessed or continued meetings, no further published or mailed notice is necessary, provided that the time and place of reconvening the recessed or continued meeting was established during the previous meeting and recorded in the minutes of that meeting. *Id.*, subd. 4.

e. *Committee meetings*

Board members who are not committee members may sometimes attend public committee meetings. When this occurs, care should be taken that a properly noticed committee meeting does not evolve into an unannounced full-board meeting. If non-committee board members participate

in the committee's discussion, they could count toward a quorum of the entire board and cause the committee meeting to be deemed an unnoticed meeting of the full board. To avoid this from occurring, board members who are not committee members generally should not attend committee meetings.

7. Relationship of the Open Meeting Law to other laws

The Open Meeting Law must sometimes be construed with other legislation, such as the MGDPA. Occasionally, a board needs to discuss data classified as not public at a meeting. In most circumstances, the board may not close the meeting to discuss not public data. The board may discuss such data without liability or penalty if the disclosure relates to a matter within the board's authority and is reasonably necessary to address the item before the board at a required public meeting. Minn. Stat. §§ 13D.03, subd. 11, 13D.05, subd. 1(b).

8. Closed meetings

The law specifies certain instances in which meetings must be closed to discuss nonpublic information and when meetings may be closed. *Id.* § 13D.05. All closed meetings, except those closed due to attorney-client privilege, must be recorded and, unless otherwise provided by law, the board must preserve the recording for at least three years. *Id.*, subd. 1(d). Also, before closing a meeting, the board must state on the record both the specific grounds for closing the meeting and the subject to be discussed. *Id.* § 13D.01, subd. 3. During the closed meeting, the board cannot discuss any other subjects besides those identified before closing the meeting. Closed meetings are subject to the same notice requirements as other meetings.

a. *Required meeting closures*

Meetings must be closed when a board discusses the following:

1. Data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, or mistreatment of minors or vulnerable adults;

2. Active investigative data or internal-affairs data relating to allegations of law enforcement personnel misconduct collected or created by a state agency, statewide system, or political subdivision;

3. Educational data, health data, medical data, welfare data, or mental health data that are not public data under certain sections of the data practices law; or

4. An individual's medical records governed by Minn. Stat. §§ 144.291 to 144.298.

Id. § 13D.05, subd. 2(a).

A board must also close one or more meetings for preliminary consideration of allegations or charges against a person subject to its authority. But these meetings must be open at the request of the person who is the subject of the meeting. *Id.*, subd. 2(b). If the board concludes that discipline of any nature may be warranted on those allegations, further meetings relating to those specific allegations must be open. *Id.*; Minn. Dep't of Admin., Advisory Op. No. 19-008 (May 22, 2019). As noted above, however, the Open Meeting Law, including this provision, does not apply to meetings at which a board exercises quasi-judicial disciplinary functions.

b. *Discretionary meeting closures*

Other grounds for closing meetings include: (1) evaluating the performance of board staff; (2) holding certain attorney-client privileged discussions; (3) reviewing certain information related to buying or selling property; (4) receiving or discussing certain security information; and (5) discussing labor negotiations. These grounds are all subject to limitations, explained in more detail below.

Evaluations. A board may close a meeting to evaluate the performance of a person subject to its authority, but the meeting must be open at the person's request. Minn. Stat. § 13D.05, subd. 3(a). If the meeting is closed, the board must identify the person being evaluated before closing the meeting. At its next open meeting, the board must summarize its conclusions regarding the evaluation. The summary should be sufficiently detailed so that the public knows the board's rationale for its conclusion. Minn. Dep't of Admin., Advisory Op. No. 16-002 (June 22, 2016). Vague summaries indicating that the board discussed strengths and weaknesses and defined areas of improvement are insufficient. *Id.* If a board cannot complete an evaluation within one meeting time, it should recess or continue the meeting and then later resume it to finish the evaluation rather than adjourning the meeting. Minn. Dep't of Admin., Advisory Op. No. 15-002 (May 5, 2015)

Attorney-Client Privilege. Preserving the attorney-client privilege provides further grounds for closing a meeting. Minn. Stat. § 13D.05, subd. 3(b). In the context of the Open Meeting Law, however, the nature of the privilege is much narrower than the privilege recognized in the private sector, and it has evolved over time. Courts have held that a meeting may only be closed when a balancing test—which weighs the public's right to be informed against the policies served by the attorney-client privilege—dictates a need for absolute confidentiality. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 737-38 (Minn. 2002); *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 440 (Minn. Ct. App. 2005); *see* Minn. Dep't of Admin., Advisory Op. No. 17-003.

The privilege typically does not apply to ordinary legal advice, or to evaluating the potential for litigation in connection with a proposed board action. *Mader*, 642 N.W.2d at 738-42. In appropriate circumstances, however, the board may invoke the privilege when specific litigation has been threatened but not actually commenced. *Dehen*, 693 N.W.2d at 440.

As previously noted, before closing a meeting, the board must state on the record the specific grounds permitting closure and describe the subject to be discussed. Minn. Stat. § 13D.01, subd. 3. A mere statement that the meeting will be closed "under the attorney-client privilege to discuss pending litigation" is insufficient; a more detailed description is required. *Free Press v. Cty. of Blue Earth*, 677 N.W.2d 471, 475-77 (Minn. Ct. App. 2004). An example of a more detailed description is, "the board is going into a closed meeting under Minn. Stat. § 13D.05, subd. 3(b), for attorney-client privileged discussions on litigation strategies [or settlement discussions] in [case name and court file number or potential lawsuit involving X]."

Buying and Selling Property. A board may also close a meeting to review not-public property appraisals or other information related to pricing, offers, or counteroffers for purchasing or selling property. Minn. Stat. § 13D.05, subd. 3(c). Before closing the meeting, the board must identify on the record the particular property at issue. The board must record the meeting and preserve the recording for eight years. The board must approve any final purchase or sale agreement at an open meeting. *Id.*

Security Information. If disclosure of the information would pose a danger to public safety or compromise security, a board may close a meeting to receive security briefings or to discuss security systems, security deficiencies, or emergency response procedures. *Id.*, subd. 3(d). But financial issues and financial decisions related to security must be discussed and decided at an open meeting. In describing the subject to be discussed at the closed meeting, the board must refer to the facilities, systems, procedures, services, or infrastructures to be considered during the closed meeting. The board must keep the recording of the closed meeting for four years.

Labor Negotiations. The board may also vote in a public meeting to hold a closed meeting to consider strategy for labor negotiations. *Id.* § 13D.03, subd. 1. The board must record the meeting and keep a copy for two years after the contract is signed. *Id.*, subd. 2. After all labor contracts are signed for the current budget period, the board must make the recording available to the public. *Id.* Posting recordings on a website ore providing access upon request satisfies this requirement. Minn. Dep't of Admin., Advisory Op. No. 21-004 (May 7, 2021).

9. Penalties for violating the law

Any person who intentionally violates the Open Meeting Law is subject to personal liability for a civil penalty of up to $300 for a single violation, costs, disbursements, and up to $13,000 in attorney's fees. Minn. Stat. § 13D.06, subds. 1, 4. The board cannot pay the penalty on behalf of the person who violated the law. *Id.* A board may—but is not required to—pay costs, disbursements, or attorney's fees incurred by or awarded against any board member. *Id.*, subd. 4(c); *see also Kroschel*, 524 N.W.2d at 721 (holding neither public body nor its insurer was required to pay litigation costs stemming from members' Open Meeting Law violations).

If a board member violates the Open Meeting Law relying on advice from counsel, it may still be considered an intentional violation if the reliance is unreasonable. *Brown v. Cannon Falls Township*, 723 N.W.2d 31, 44-46 (Minn. Ct. App. 2006). And a member can violate the Open Meeting Law by supporting an improper meeting even if the member does not attend. *Id.* at 48 (holding board member violated Open Meeting Law because he agreed to board holding noncomplying meeting, even though he ultimately did not attend for personal reasons).

If a person intentionally violates the Open Meeting Law in three or more separate actions connected with the same board, the person forfeits any further right to serve on the board, or in any other capacity with the board, for a time equal to the term of office the person was then serving. Minn. Stat. § 13D.06, subd. 3(b); *see also Funk v. O'Connor*, 916 N.W.2d 319, 321-22 (Minn. 2018) (interpreting removal provisions). After finding a third violation, unrelated to the previous violations, the court will declare the position vacant and notify the appointing authority or the board's clerk. The appointing authority must then fill the position as soon as practicable. Minn. Stat. § 13D.06, subd. 3.

10. Advisory opinions on Open Meeting Law issues

An entity subject to the Open Meeting Law may ask the Commissioner of Administration for a written opinion on any question related to the entity's duties under the Open Meeting Law. A person who disagrees with how a governing body performs its duties under the Open Meeting Law may also request an opinion. The government entity or person requesting this type of opinion must pay a $200 fee. *Id.* § 13.072, subd. 1(b). The Department of Administration publishes its opinions and provides other Open Meeting Law resources on its website: *mn.gov/admin/data-practices/*.

The Commissioner's opinions are not binding, but a board or board member who acts in conformity with a written opinion of the Commissioner is not liable for fines, attorney's fees, or any other penalty or subject to forfeiture of office under the Open Meeting Law. *Id.*, subd. 2. Conversely, a court can award attorney's fees in a lawsuit if a board was the subject of a previous Commissioner's opinion directly related to the litigation's subject matter and the board did not follow the opinion. *Id.* § 13D.06, subd. 4(e).

C. Public Meetings Prohibited on Certain Days

A board cannot conduct a public meeting on the day of the state primary or general election, or after 6:00 p.m. on the day of a major political party precinct caucus. *Id.* §§ 202A.19, subd. 6, 204C.03, subd. 4. Except in cases of necessity, public meetings cannot be held on official state holidays listed in Minn. Stat. § 645.44, subd. 5.

D. Minnesota Government Data Practices Act

The MGDPA, found in chapter 13 of the Minnesota Statutes, is a complex piece of legislation that has been frequently amended over the years. The MGDPA governs nearly every aspect of a board's collection, creation, storage, maintenance, or dissemination of information and provides for the recovery of civil damages, punitive damages, and attorney's fees for violating the law. *Id.* § 13.08, subd. 1. The MGDPA presumes that government data are public unless otherwise classified by a federal or state law or by the Commissioner of the Department of Administration through a temporary classification. *Id.* § 13.01, subd. 3. Public policies supporting the MGDPA include accountability and transparency.

In recent years, MGDPA compliance has increasingly required more government resources and been a source of litigation. Government entities have been held liable both for improperly releasing not public data and for refusing to release public data. *See, e.g.*, *Westrom v. Minn. Dep't of Labor & Indus.*, 686 N.W.2d 27 (Minn. 2004) (holding that agency improperly released civil investigative data to news organizations); *Navarre v. S. Wash. Cnty. Sch.*, 652 N.W.2d 9 (Minn. 2002) (affirming $520,000 damages award for releasing information about complaints about teacher); *Wiegel v. City of St. Paul*, 639 N.W.2d 378 (Minn. 2002) (holding city liable for attorney's fees for failing to disclose interviewers' notes about applicants who failed civil-service exams).

The MGDPA contains eleven distinct data classifications. Minn. Stat. § 13.02, subds. 3-5, 7, 8a-9, 12-15, 19 (defining "confidential data on individuals," "data not on individuals," "data on individuals," "government data," "not public data," "nonpublic data," "private data on individuals," "protected nonpublic data," "public data not on individuals," "public data on individuals," and "summary data"). The data classification determines who may access the data. In general terms, most data that boards handle will usually be classified as *public* (i.e., available to everyone), *private* (i.e., available to the individual data subject, but not the public), or *confidential* (i.e., unavailable to the individual data subject or the public). But the same data may simultaneously have conflicting classifications. For example, depending on its purpose, the same

data can be classified as public and confidential at the same time. *See Harlow v. Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016) (observing that MGDPA does not prohibit "anomalous" outcomes). The precise classification of any government data is determined by the law applicable to the data when a data request is made. Minn. Stat. § 13.03, subd. 9; *see also KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 349 (Minn. 2016) (holding that timing of data request determines classification). The correct legal analysis of issues concerning application of the MGDPA will always hinge on the specific facts presented.

1. Common types of government data maintained by boards

"Government data" means all data collected, created, received, maintained, or disseminated by any government entity regardless of its physical form, storage media or conditions of use. Minn. Stat. § 13.02, subd. 7. Common forms of data handled by most boards may include licensing data, civil investigative data, personnel data, Social Security numbers, security and trade secret information, and personal contact and online-account information.

a. *Licensing data*

Licensing data are data on *individual* applicants and licensees (as opposed to, for example, licensed corporations and non-licensees). Active investigative data collected by a licensing agency relating to complaints against a licensee are confidential. *Id.* § 13.41, subd. 4. Private data on individual licensees include the identities of complainants appearing in inactive investigative data who have made reports concerning licensees; the nature and content of unsubstantiated complaints; and inactive investigative data related to violations of statutes and rules. *Id.*, subd. 2. Public data on licensees typically include names, designated addresses, and license applications; orders for hearing; findings of fact, conclusions of law, and specification of final disciplinary actions; the record of a disciplinary proceeding if a public hearing occurred; and settlement agreements between boards and licensees, along with the specific reasons for the agreement. *Id.*, subds. 2, 5.

Given the public nature of disciplinary proceedings against licensees, a board should include in its final order only facts that form the basis for disciplinary action. For example, in *Doe v. Minnesota State Board of Medical Examiners*, 435 N.W.2d 45 (Minn. 1989), the Board of

Medical Examiners found that a doctor did not properly prescribe medications. The board's order, however, also discussed dismissed complaints related to sexual relations with former patients. The Minnesota Supreme Court held that, by including a detailed discussion of the dismissed charges and other information unrelated to its disciplinary action, the board exceeded the scope of what could properly be made public in its decision. The court further ordered the board to pay the doctor attorney's fees under Minn. Stat. § 13.08, subd. 4(a).

In contrast to data on licensees, only the name and designated addresses of applicants are public data. *Id.*, subd. 2. Moreover, unless a more specific statute applies, administrative hearings and the evidentiary record related to final orders denying license applications are generally not public. This is because a license denial typically does not constitute a "disciplinary proceeding" to classify the data as public under Minn. Stat. § 13.41, subd. 5.

b. *Civil investigative data*

Civil investigative data are data collected as part of an active investigation undertaken to commence or defend a pending civil legal action, or retained in anticipation of a pending civil legal action. *Id.* § 13.39, subd. 2(a). These data may encompass a board's investigation related to violations committed by, for example, corporate licensees and non-licensees. A "pending civil legal action" includes judicial, administrative, and arbitration proceedings. *Id.*, subd. 1. Active civil investigative data are typically not accessible by anyone during the investigation. *See Star Tribune v. Minn. Twins P'ship*, 659 N.W.2d 287, 298 (Minn. Ct. App. 2003) (observing purpose was to avoid disadvantaging government agencies by prematurely disclosing investigative work product). A board may nevertheless make civil investigative data accessible to any person, agency, or the public if the board determines that access will aid law enforcement, promote public health or safety, or dispel widespread rumor that poses a threat. Minn. Stat. § 13.39, subd. 2(a).

Similar to licensing data related to licensees, civil investigative data generally become public when presented as evidence in court or made part of the court record. *Id.* §§ 13.39, subd. 3, 13.41, subd. 5. In contrast to inactive licensing investigative data (which are private), inactive civil investigative data are public unless release would jeopardize another pending civil legal action. *Id.*

§§ 13.39, subd. 3, 13.41, subd. 2. Civil investigative data become inactive upon a decision not to pursue the civil action, expiration of the statute of limitations to file the civil action, or the exhaustion or expiration of any rights to appeal the civil action. *Id.* § 13.39, subd. 3.

c. *Personnel data*

Personnel data are data on individuals that the board maintains because the individual is, was, or applied to be, a board employee. *Id.* § 13.43, subd. 1. Certain types of personnel data are public, such as an employee's name, salary, job title, and educational background, as well as each applicant's job history, education and training, and work availability. *Id.*, subds. 2-3. Most other types of personnel data are private, including the specific reasons and basis for complaints or charges against an employee (or applicant) until there has been a "final disposition of any disciplinary action." *Id.*, subds. 2(a)(4)-(5), 4. During personnel investigations, a board can disclose only the existence and status of complaints. *Navarre*, 652 N.W.2d at 22. Finally, a job applicant's name remains private until the applicant is certified as eligible for the employment vacancy or considered by the appointing authority to be a finalist for the position. Minn. Stat. § 13.43, subd. 3.

d. *Social Security numbers*

Social Security numbers—whether in whole or in part—that a board collects or maintains are private data and should be safeguarded. *Id.* § 13.355, subd. 1. A board may not mail or cause to be mailed an item that displays a Social Security number on the outside of the item or in a manner where the Social Security number is visible without opening the item. *Id.*, subd. 3.

e. *Security and trade secret information*

"Security information" includes any data that could substantially jeopardize the security of information, individuals, or possessions against theft, tampering, improper use, illegal disclosure, or injury. *Id.* § 13.37, subd. 1(a). Security information includes and can range from bank account numbers to global-positioning-system locations. *Id.* "Trade secret information" are data that (1) an individual or organization gives to a board; (2) the individual or organization has taken reasonable efforts to maintain the data's secrecy; and (3) have independent economic value, whether actual

or potential, from not being generally known. *Id.*, subd. 1(b). Security and trade secret information are generally not public but may be accessible by data subjects depending on the circumstances. *Id.*, subd. 2. Boards may also, in consultation with appropriate law enforcement, emergency management, or other officials, share security information to "aid public health, promote public safety, or assist law enforcement." *Id*., subd. 3(b).

f. *Personal contact and online-account information*

Subject to limited exceptions, the following data on an individual that a government entity collects, maintains, or receives for notification purposes or as part of a subscription list for a board's electronic periodic publications are private data on individuals: (1) telephone number; (2) e-mail address; and (3) Internet user-name, password, Internet protocol address, and any other similar data related to the individual's online account or access procedures. *Id.* § 13.356.

2. Duty to preserve data

Public officers and boards are required to "make and preserve all records necessary to a full and accurate knowledge of their official activities." *Id*. § 15.17. The requirement to preserve records applies to "government records," which is defined broadly to include, among other data, correspondence, memoranda, writings, and other documentary material. *Id.* § 138.17, subd. 1(b)(1). The definition of records excludes "data and information that does not become part of an official transaction," as well as extra copies of documents. *Id*., subd. 1(b)(4).

Boards must establish a retention schedule establishing a period to retain official records before they may be lawfully destroyed. *Id*., subd. 7. Failing to retain records in accordance with the retention schedule may subject boards to liability under the MGDPA. *Halva v. Minn. State Colls. & Univs.*, 953 N.W.2d 496, 506-07 (Minn. 2021). While retaining data beyond a retention schedule does not violate the MGDPA, boards are encouraged to cull obsolete and unnecessary data whenever legally possible.

3. Duties of responsible authority and compliance official

The "responsible authority" is the individual the board designates to be responsible for collecting, using, and disseminating any data on individuals, government data, or summary data.

Minn. Stat. § 13.02, subd. 16. The responsible authority must establish procedures to ensure that the board receives and responds to data requests appropriately and promptly. *Id.* § 13.03, subd. 2; *see also Webster v Hennepin Cnty.*, 910 N.W.2d 420, 431-33 (Minn. 2018) (affirming that county's data-practices procedures did not ensure county promptly and appropriately responded to data requests). The responsible authority must also prepare, and update as necessary, a written policy addressing the rights of data subjects and specific procedures for them to access public and private data. Minn. Stat. § 13.025, subd. 3. The responsible authority must make the policy easily available to the public by distributing free copies to the public, posting it in a conspicuous place within the board's office, or publishing it on the board's website. *Id.*, subd. 4.

Each board's responsible authority must also prepare an annual inventory, which is a public document containing the board's name, title and address, and a description of each category of record, file, or process the board maintains containing private or confidential data. *Id.*, subd. 1. The responsible authority must further establish procedures to assure that data on individuals are accurate, complete, and current for the purposes for which the data were collected and establish appropriate security safeguards for all records containing data on individuals. *Id.* § 13.05, subd. 5.

Each board must designate an employee to act as its data practices compliance official. *Id.*, subd. 13. People may direct questions or concerns regarding accessing data to the data practices compliance official. The responsible authority may also be the data practices compliance official.

4. Rights of individuals

The MDGPA gives specific rights to individuals who are the subject of government data. Boards must be mindful of these rights when creating, receiving, collecting, maintaining, and disseminating data on individuals.

a. *Rights before collection: Tennessen warning*

Perhaps the most well-known individual right related to the MGDPA is the "Tennessen warning," which is named after Senator Robert Tennessen, the author of the Minnesota's original data-privacy law. Analogous to a *Miranda* warning in criminal cases, a board must give a Tennessen warning when asking an individual to supply private or confidential information

concerning the individual. The board must inform the individual of: (a) the purpose and intended use of the requested data; (b) whether the individual may refuse or is legally required to supply the requested data; (c) any known consequence arising from providing or refusing to provide private or confidential data; and (d) the identity of other persons or entities authorized by state or federal law to receive the data. *Id.* § 13.04, subd. 2. A Tennessen warning need not be given in writing, but if given orally, it should be documented in the appropriate board file. Significantly, subject to limited exceptions, boards may not collect, store, use, or disseminate any private or confidential data on an individual for any other purposes than those stated to the individual when the data was collected. *Id.* § 13.05, subd. 4.

If a board is investigating to gather facts about an incident and identifying a particular individual is only incidental to the inquiry's focus, a Tennessen warning may not be required. But board staff should consult legal counsel before deciding not to give the warning.

b. *Rights after collection*

Upon request, a board must inform an individual whether he or she is the subject of stored data and whether the data are classified as public, private, or confidential. *Id.* § 13.04, subd. 3. An individual who is the subject of public or private data must further be shown the data without any charge and, if requested, informed of its content and meaning. *Id.* If possible, the responsible authority must comply immediately with any request by the subject of the data, or within ten working days after the request if immediate compliance is not possible. *Id.* After showing the individual the data, the board need not disclose the data to the individual again for six months, unless an action is pending or additional data have been collected or created. *Id.*

An individual subject of data may contest its accuracy or completeness by submitting a written notice to the responsible authority that describes the nature of the disagreement. *Id.*, subd. 4(a). The responsible authority must then either correct any data found to be inaccurate or incomplete and notify past recipients of inaccurate or incomplete data, or notify the individual that the authority believes the data are correct. *Id.* Disputed data shall be disclosed to others only if the individual's statement of disagreement is included with the disclosed data. *Id.* The responsible

authority's determination may be appealed as a contested case under the APA. *Id.*; *Schwanke v. Minn. Dep't of Admin.*, 851 N.W.2d 591, 593-95 (Minn. 2014) (holding that employee could contest accuracy of statements in employee evaluation that were capable of being verified as true or false). Data on individuals that have been successfully challenged by an individual must be completed, corrected, or destroyed by the board, depending on the nature of the inaccuracy. Minn. Stat. § 13.04, subd. 4(b).

5. Rights of the public

The MGDPA authorizes the public to inspect and copy public data at reasonable times and places, and to be informed of the data's meaning. *Id.* § 13.03, subd. 3. Unless authorized by statute, a board cannot require a person to provide his or her identity or the reason for the data request. *Id.* § 13.05, subd. 12. A person may, however, be asked to provide identifying or clarifying information to facilitate access to data in which the requestor's identity affects access. For example, certain data are available only to the subject of the data.

A board cannot charge a fee to inspect public data. *Id.* § 13.03, subd. 3(a). Inspection includes visually inspecting paper and similar types of government data. It does not include printing copies unless that is the only method to permit inspection. *Id.* If a person requests copies or electronic transmittal of the data to the person, the responsible authority must provide copies, but may require the requesting person to pay the actual costs of searching for and retrieving the data, including the cost of employee time and the costs of making, certifying, compiling, and transmitting the copies. *Id.*, subd. 3(c). Actual costs cannot be charged, however, if 100 or fewer pages of black and white, letter- or legal-size paper are requested. *Id.* Instead, the responsible authority may charge up to 25 cents per page. If copies cannot be provided when a request is made, the responsible authority shall provide them as soon as reasonably possible. *Id.*

If the responsible authority maintains public data in a computer-storage medium, the board must provide, upon request, a copy of public data contained in that medium, in electronic form, if a copy can reasonably be made. Data, however, only have to be provided in the same electronic format or program used by the board. *Id.*, subd. 3(e). If the board stores data in electronic form and

makes the data available to the public on a remote-access basis, inspection includes remote access to the data by the public and the ability to print copies of, or download, the data on the public's own computer equipment. A board may charge a fee for remote access to data when it enhances the data or the access at the request of the person seeking access. *Id.*, subd. 3(b).

When denying access to not public data, the responsible authority must inform the requester of the denial, either orally when the request is made or in writing as soon after the request as possible. *Id.*, subd. 3(f). The responsible authority must also cite the specific provision of state or federal law, or the temporary classification, that prohibits access to the data. The responsible authority is not required to create a log of the denied data. Upon the request of any person denied access, the responsible authority must also certify in writing that the request has been denied and identify the legal basis for the denial. *Id.*

6. Accessing not public data via court orders

A person denied access to not public data may seek to compel the board to produce the data by making a motion to a presiding judge. *Id.* § 13.03, subd. 6. The judge must first decide whether the data are discoverable or releasable pursuant to the relevant court or administrative rules appropriate to the action. *Id*. If the data are discoverable, the judge must then decide "whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the agency maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy of an individual identified in the data." *Id.* In making this decision, the judge must consider whether notice to the data subject is warranted and may issue any protective orders necessary to assure proper handling of the data by the parties. *Id.* As an example, a board typically will not disseminate active investigative data to the subject of the investigation until after an action has been commenced and the judge has issued a protective order under Minn. Stat. § 13.03, subd. 6.

7. Disseminating private data with informed consent

A board may use and disseminate private data to third parties if the individual subject of the data gives informed consent. *Id.* § 13.05, subd. 4(d). Informed consent means the data subject

has and uses sufficient mental capacity to make and appreciate the consequences of allowing the board to use or disseminate the data. Minn. R. 1205.1400, subp. 3. Informed consent generally must be in writing, but implied consent may occur if specific steps are followed. *Id.*, subp. 4. In seeking informed consent, the responsible authority must explain the necessity for, or consequences of, the sought consent. *Id.*

8. Data breaches

A board that collects, creates, receives, maintains, or disseminates private or confidential data on individuals must disclose any security breach of the data after discovering or receiving notice of the breach. Minn. Stat. § 13.055, subds. 1(a), 2(a). The board must notify the individuals whose private or confidential data were, or are reasonably believed to have been, acquired by an unauthorized person. *Id.*, subd. 2(a). Notification must be within the most expedient time possible, consistent with the legitimate needs of a law enforcement agency and with any measures necessary to determine the scope of the breach and restore the reasonable security of the data. *Id.* Alternate methods of notice include first-class mail, electronic notice, and "substitute notice." *Id.*, subd. 4. A board must also notify nationwide consumer reporting agencies if the board discovers a breach that requires notice to more than 1,000 individuals. *Id.* § 13.055, subd. 5. Finally, the board must notify the legislative auditor when not public data may have been accessed by or provided to a person without lawful authorization. *Id.* § 3.971, subd. 9; *see also Smallwood v. Dep't of Human Servs.*, 966 N.W.2d 257, 261 (Minn. Ct. App. 2021) (holding that plaintiff did not have claim against agency for unlawfully disseminating data in violation of Minn. Stat. § 13D.05, subd. 4, when person unlawfully obtained data by hacking into government account, but holding that plaintiff stated claim for lack of appropriate safeguards to protect data).

9. Penalties for violating the MGDPA

A person who believes that that a board or board member violated the MGDPA may sue in district court or seek an administrative remedy at the Office of Administrative Hearings. Minn. Stat. §§ 13.08, .085. Violating the MGDPA may subject a board and its members to a variety of

sanctions, ranging from monetary sanctions to criminal liability. The following sections outline these sanctions and underscore the importance of complying with the MGDPA.

a. *Board liability*

In district court actions, a board that violates any provision of the MGDPA is liable for damages caused by the violation, plus costs and reasonable attorney's fees. *Id.* § 13.08, subd. 1. In the case of a willful violation, the board is additionally liable for exemplary damages ranging from $1,000 to $15,000 for each violation. *Id.* A court may also enjoin the board and its responsible authority to stop further MGDPA violations. *Id.* § 13.08, subd. 2. A board may further be subject to a civil penalty of up to $1,000 if a court issues an order to compel compliance with the MGDPA. *Id.* § 13.08, subd. 4.

In MGDPA actions pursued at the Office of Administrative Hearings, an ALJ may impose a civil penalty of up to $300; issue an order compelling compliance; and refer the complaint to the appropriate prosecuting authority for consideration of criminal charges. *Id.* § 13.085, subd. 5(a). A rebuttable presumption also exists that the party who filed the complaint is entitled to reasonable attorney's fees, up to $5,000. *Id.*, subd. 6. A party who seeks an administrative remedy first is not precluded from bringing another action in district court alleging the same violation and seeking damages, although the ALJ's decision is not controlling in the latter case. *Id.* § 13.085, subd. 5€b

b. *Individual liability*

Any person—including a board member—who willfully violates the MGDPA or any rules adopted under it is guilty of a misdemeanor. *Id.* § 13.09(a). Willfully violating the MGDPA constitutes just cause for a public employee's dismissal or suspension without pay. *Id.* § 13.09(b).

c. *Immunity*

A board or person releasing not public data—including confidential or private data—pursuant to a judge's order is immune from civil and criminal liability for the data's release. *Id.* §§ 13.03, subd. 6, .08, subd. 5, .085, subd. 5(f).

10. Opinions by the Commissioner of Administration

A board may request an opinion from the Commissioner of the Department of Administration on any question relating to the MGDPA or other state statutes governing government data. *Id.* § 13.072, subd. 1. An individual who disagrees with a board's determination on data access may also request an opinion. Commissioner opinions do not bind a board whose data is the subject of the opinion, but courts should defer to an opinion in proceedings involving the data. *Id.*, subd. 2. In determining whether to assess a penalty for an MGDPA violation, the court will consider whether the board acted in conformity with a written Commissioner opinion. *Id.* § 13.08, subd. 4(b)(5). A court may also award reasonable attorney's fees to a prevailing plaintiff who has brought an action in district court or the Office of Administrative Hearings if the board was the subject of a Commissioner's written opinion directly related to the cause of action being litigated and the board did not follow the opinion. *Id.* §§ 13.08, subd. 4(c), .085, subd. 6(b).

E. Ethics in Government

Many state laws address ethics in government, some of which apply to board members and employees. The laws that primarily affect boards are in Minn. Stat. ch. 10A (Ethics in Government Act) and Minn. Stat. § 43A.38 (Code of Ethics for Employees in the Executive Branch). If a conflict exists between chapter 10A and section 43A.38, chapter 10A controls. Minn. Stat. § 43A.38, subd. 8. Chapter 10A is enforced by the Campaign Finance and Public Disclosure Board ("CFPDB"), which regulates lobbying, conflicts of interests, political committees, and campaign funding practices. The CFPDB is authorized to investigate alleged or potential violations of the chapter and to determine whether probable cause exists to believe a violation has occurred. Minn. Stat. § 10A.022, subd. 3.

1. Conflicts of interest

Any public official who, in discharging official duties, would be required to take an action or make a decision that would substantially affect the official's financial interests or those of an associated business must follow specified procedures to disclose the potential conflict of interest. *Id.* § 10A.07, subd. 1(a). "Public official" includes any member, chief administrative officer, or

deputy chief administrative officer of a state board that either has the power to adopt, amend, or repeal rules, or has the power to adjudicate contested cases or appeals; managers of watershed districts; members of a watershed management district; and supervisors of soil and water conservation districts.[2] *Id.* § 10A.01, subd. 35. A financial interest includes any ownership or control of an asset that may potentially produce a monetary return. *Id.* § 10A.07, subd. 1(b). The disclosure procedures are not required when the effect on the official is no greater than on other members of the public official's business classification, profession, or occupation. *Id.*, subd. 1(a).

When faced with a potential conflict of interest, the public official must give notice and not participate in the action giving rise to the potential conflict. *Id.* §§ 10A.07, subds. 1-2, 43A.38, subd. 7. Notice is given by completing a conflict-of-interest form and delivering copies of the form to the CFPDB and to the official's immediate superior. If insufficient time exists to file the notice in advance, then the public official must orally inform the superior and file the required written notice within one week of learning of the potential conflict.

A public official who has a potential conflict of interest should remove himself from the conflict. In the case of a decision made by a state board, a member cannot "chair a meeting, participate in any vote, or offer any motion or discussion on the matter giving rise to the potential conflict of interest." *Id.* § 10A.07, subd. 2(b). The question arises whether abstention is sufficient without complying with the notice provision. In 1987, the Minnesota Supreme Court implied that both steps were required of a public utilities commissioner faced with a conflict of interest. *In re Petition of N. States Power Co.*, 414 N.W.2d 383, 386 (Minn. 1987).

[2] Certain boards, such as the Council on Asian-Pacific Minnesotans, the Council for Minnesotans of African Heritage, the State Council on Disabilities, the Law Examiners Board, the Ombudsperson for Families, the Ombudsperson for Mental Health and Developmental Disabilities, and the Minnesota Council on Latino Affairs, do not have the power to adopt, amend, or repeal rules or the power to adjudicate contested cases or appeals. Members or administrative officers of these boards are therefore not public officials subject to chapter 10A requirements. But all executive-branch employees are subject to the requirements of Minn. Stat. § 43A.38. Questions regarding whether an individual is an executive-branch employee can be directed to your board's counsel.

Upon request of an individual, the CFPDB can publish advisory opinions on the requirements of chapter 10A. The individual may, in good faith, rely on an advisory opinion. Minn. Stat. § 10A.02, subd. 12(b). A written advisory opinion binds the CFPDB in any later proceeding it brings against the person who requested the opinion or whose conduct the opinion addressed, unless the CFPDB amended or revoked the opinion or the opinion requester omitted or misstated material facts. *Id.* If the CFPDB intends to apply new principles of law or policy from the opinion more broadly, the CFPDB must adopt rules. *Id.*, subd. 12a. Nevertheless, the CFPDB's advisory opinions are useful guides to boards with questions regarding chapter 10A. These opinions are available online at *cfb.mn.gov*.

Substantially similar conflict-of-interest provisions apply to all executive-branch employees under Minn. Stat. § 43A.38.[3] If an executive-branch employee is faced with a potential conflict of interest, it is the employee's duty to avoid the situation. *Id.*, subd. 6. If the employee or the appointing authority determines that a conflict exists, the matter must be assigned to another employee if possible. *Id.*, subd. 7. If reassignment is not possible, interested persons must be notified of the conflict. *Id.* The statute enumerates several situations that are deemed to be conflicts of interest. *Id.*, subd. 6.

Members of health-related licensing boards also have a specific conflict-of-interest provision that expressly prohibits them from participating in a case if the member has a direct current or former financial connection or professional relationship to the subject of a disciplinary action. Minn. Stat. § 214.10, subd. 8(b). The Agricultural Chemical Compensation Board similarly has a board-specific conflict-of-interest rule. Minn. R. 1512.0500. If a board member has a direct or indirect financial or employment interest relating to a matter before the board that is likely to affect the member's impartiality, that member must make the interest known and refrain from

[3] For purposes pf section 43A.38, certain boards and agencies, and their employees, are not considered part of the executive branch. Minn. Stat. § 43A.02, subd. 22 (excluding University of Minnesota, the Public Employees Retirement Association, the Minnesota State Retirement System, the Teachers Retirement Association, and the Minnesota Historical Society).

participating in or voting on the matter. *Id.* The abstention of a board member or members does not prevent the remaining members from conducting a legal vote. *Id.*

2. Statements of economic interest

Public officials are required to file statements of economic interest. Minn. Stat. § 10A.09. A public official must file a statement of economic interest with the CFPDB within 60 days of the effective date of appointment. *Id.*, subd. 1(1). The statement is made on a CFPDB-prescribed from that calls for the following information: name, address, occupation, and principal place of business; the name of each associated business and the nature of that association;[4] a listing of all real property within the state, excluding homestead property, in which the individual holds an interest valued in excess of $2,500 or an option to buy property worth $50,000 or more; a listing of all real property in the state in which the member's partnership holds a value in excess of $2,500 or an option to purchase property worth $50,000 or more; a listing of the principal business or professional activity category from which the official receive more than $250 a month as an employee if the official owns more than 25% of the business, or $2,500 in the past twelve months as an independent contractor; a listing of any investments and property interests held by the official or an immediate family member in the United States or Canada connected with pari-mutuel horse racing; a listing of all securities in which the official's share has a market value of more than $10,000.[5] *Id.*, subds. 5-5a. The CFPDB has interpreted this statute to require reporting of all investments, including shares of stock and mutual funds.

Every person required to file a statement of economic interest must file an annual statement by the last Monday in January of each year that he or she remains in office. *Id.*, subd. 6. If a

[4] "Associated business" means any association in connection with which the individual is compensated in excess of $250 except for actual and reasonable expenses in any month as a director, officer, owner, member, partner, employer or employee, or holds securities worth $10,000 or more at fair market value. Minn. Stat. § 10A.01, subd. 5.

[5] The relevant time reference for each topic of disclosures varies. Most require the disclosure to cover the calendar month before the month in which the individual assumed or undertook an office's duties, but a person's name, address, occupation, and principal place of business must cover the month before the month in which the individual assumed or under took the duties of office. Minn. Stat. § 10A.09, subd. 5a.

supplementary statement is required, it shall include the amount of each honorarium exceeding $250 received since the previous statement, together with the name and address of the source of the honorarium. *Id.*

3. Gifts

With minor exceptions, state law prohibits public officials from accepting gifts from lobbyists or their employers. *Id.* § 10A.071. Most professional associations are lobbyists, or employers of lobbyists, for these purposes. A gift is defined as "money, real or personal property, a service, a loan, a forbearance or forgiveness of indebtedness, or a promise of future employment, that is given and received without the giver receiving consideration of equal or greater value in return." *Id.*, subd. 1(b). This broad rule includes entertainment, loans of personal property for less than payment of fair market value, preferential treatment for purchases or honoraria, and food or beverages provided at a meeting, unless the public official is appearing to make a speech or answer questions as part of a program.[6]

Again, Minn. Stat. § 43A.38 has substantially similar provisions prohibiting all executive-branch employees from accepting any payment of expense, compensation, gift, reward, gratuity, favor, service or promise of future employment or other future benefit from *any source,* except the state, for any activity related to the duties of the employee unless otherwise provided by law. *Id.* § 43A.38, subd. 2. Specific exceptions to the prohibition are listed in the statute. *Id.* There is also a prohibition on gifts related to state contracts. *Id.* § 15.43, subd. 1.

4. Lobbyist registration

Lobbyists must register with the CFPDB. *Id.* § 10A.03. A lobbyist is defined by Minn. Stat. § 10A.01, subd. 21, and does not include state employees or "public officials." Therefore, in general, members and employees of state boards appearing before the legislature in connection with board business are not considered lobbyists under the statute and need not register with the

[6] Some exceptions to the gift prohibition include services to assist an official in performing official duties; services of insignificant monetary value; a plaque or similar memento recognizing individual services in a field of specialty or to a charitable cause; a trinket or memento of insignificant value; and informational material of unexceptional value. Minn. Stat. § 10A.071, subd. 3.

CFPDB. But if a state board member appears before the legislature under other circumstances, registration as a lobbyist may be required by section 10A.03.

5. Use of state time, resources, and information

Board members and board staff will inevitably have access to certain data and resources through their roles. As outlined below, board members and staff must not use board information and resources for personal reasons.

a. *Confidential information*

An executive-branch employee cannot use confidential information to further the employee's private interest or accept outside employment or involvement in a business or activity that will require the employee to disclose or use confidential information. Minn. Stat. § 43A.38, subd. 3.

b. *Property, time, and supplies*

Except as provided by law, a state employee cannot use or allow the use of state time, supplies, property, or equipment for the employee's private interests or any other use not in the state's interest. *Id.*, subd. 4. This includes using state stationery, postage, telephones, electronic mail, fax machines, and photocopying equipment. The fact that the non-state use does not increase the cost to the state is irrelevant, as is prompt reimbursement of any costs that may be inadvertently incurred.

One small exception to this general rule exists for electronic communication (i.e., electronic mail). Executive-branch employees may use state time, property, or equipment to communicate electronically with other persons if the use, including the value of the time spent, either results in no incremental cost to the state or results in an incremental cost that is so small as to make accounting for it unreasonable or administratively impracticable. *Id.*, subd. 4(b).[7]

[7] Minnesota Management and Budget has adopted a detailed policy on this topic. MMB, HR/LR Policy #1423 State Policy: Appropriate Use of Electronic Communication and Technology, available at *mn.gov/mmb/assets/1423-appropuseoftechpdf_tcm1059-322068.pdf*. Additional MMB policies on ethics and many other human-resources topics are available at *mn.gov/mmb/employee-relations/laws-policies-and-rules/statewide-hr-policies/*.

6. Political activity

The Fair Campaign Practices Act provides that a state employee or official may not use official authority or influence to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity. *Id.* § 211B.09. Using an official position to influence political activity is also prohibited by Minn. Stat. § 43A.32, subd. 1.

F. The Equal Access to Justice Act

The Minnesota Equal Access to Justice Act ("MEAJA"), Minn. Stat. §§ 15.471-.474, potentially subjects a board to attorney's fees claims if the board takes an action that lacks a reasonable basis in fact and law. MEAJA's key provision states:

> If a prevailing party other than the state, in a civil action or contested case proceeding other than a tort action, brought by or against the state, shows that the position of the state was not substantially justified, the court or administrative law judge shall award fees and other expenses to the party unless special circumstances make an award unjust.

Minn. Stat. § 15.472(a). "Party" means a person named or admitted as a party in a court action or contested-case proceeding, who is a small business, including a partner, officer, shareholder member, or owner. *Id.* § 15.471, subd. 6. "State" means "the state of Minnesota or an agency or official of the state acting in an official capacity." *Id.*, subd. 7. "Substantially justified" means "the state's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding." *Id.*, subd. 8. That a party prevailed on the merits does not automatically mean that the agency's position was not "substantially justified." *Donovan Contracting v. Minn. Dep't of Transp.*, 469 N.W.2d 718, 720-21 (Minn. Ct. App. 1991).

Attorney's fees awarded under MEAJA are based on the prevailing market rate. Minn. Stat. § 15.471, subd. 5. Recoverable expenses includes filing fees, subpoena fees and mileage, transcript costs, court reporter fees, expert witness fees, photocopying and printing costs, postage and delivery costs, and service-of-process fees. *Id.*, subd. 4. Expenses may also include the reasonable cost of any "study, analysis, engineering report, test or project" incurred by a party in the litigation.

Id. There is some question whether this statute applies in licensing proceedings because the law focuses on small businesses and a license is typically held in a person's individual capacity.

VIII. LITIGATION ARISING FROM BOARD ACTION: COMMON CLAIMS AND DEFENSES

In addition to facing liability for violating the MGDPA or bringing an action that was not substantially justified under MEAJA, boards and board members may be sued under other causes of actions because of their work. This section outlines boards' general responsibilities related to litigation, some of the most common types of claims brought against boards, and some of the common defenses to those claims.

A. Litigation Holds

Federal and state discovery rules obligate organizations to preserve documents and other information relevant to potential or pending litigation. If there is potential or pending litigation involving a board, the Attorney General's Office may send a litigation-hold notice reminding the board of its ongoing duty to preserve all documents and electronically-stored information that may be relevant to the litigation. It is the board's responsibility to implement the litigation hold and ensure that individuals with relevant information preserve it throughout the course of any litigation. A board's failure to implement a litigation hold and ensure the continued preservation of all relevant information while litigation is pending or reasonably anticipated may result in a court imposing severe sanctions against the board. Possible sanctions may include monetary penalties and exclusion of evidence.

B. Tort Claims: Liability Under Minnesota Statutes and Common Law

A "tort" is a non-contractual civil wrong that is generally defined as the violation of a duty of care owed to a party that results in property damage, personal injury, or death. A board member's liability for tortious acts is controlled by the Torts Claim Act, Minn. Stat. §§ 3.732-.756. Section 3.736, subdivision 1, provides:

> The state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment . . . and who is acting in good faith . . . under circumstances where the state, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function.

The Tort Claims Act generally does not waive judicial, quasi-judicial, or legislative immunity. *Id.* § 3.736, subd. 1. For purposes of the Tort Claims Act, "state" includes all departments, boards, agencies, commissions, courts, and officers in the executive, legislative, and judicial branches of the State of Minnesota. Minn. Stat. § 3.732, subd. 1(1). An "employee of the state" includes all present or former officers, members, directors, or employees of the state. *Id.* § 3.732, subd. 1(2). Under these definitions, state boards are the "state" and their members and employees are "employees of the state" for purposes of the Tort Claims Act. Rulings of personal liability against board members, however, are rare.

1. Statutory exclusions from liability

The Tort Claims Act contains several exclusions that give boards and board members immunity from tort liability for certain conduct. The following exclusions apply to board activities: good-faith immunity; discretionary immunity; and, when applicable, licensing immunity. Minn. Stat. § 3.736, subd. 3.[8]

a. *Good-faith immunity*

Good-faith immunity provides immunity for "a loss caused by an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule." Minn. Stat. § 3.736, subd. 3(a). Good-faith immunity applies when, as a matter of law, a state employee has a duty to act and exercises due care in executing that duty. *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982).

b. *Statutory discretionary immunity*

Statutory discretionary immunity provides immunity for "a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused." Minn. Stat. § 3.736, subd. 3(b). This doctrine recognizes that courts, through a negligence action, are not an

[8] In addition to the immunities provided by the Tort Claims Act, a second source of statutory immunity may be found in a board's governing statutes. For example, a specific law provides immunity from civil liability and criminal prosecution to the Board of Medical Practice's members, employees, and consultants for actions related to their duties under the board's practice act. Minn. Stat. § 147.121, subd. 2.

appropriate forum to review and second-guess government acts that involve exercising judgment or discretion. *Cairl v. State*, 323 N.W.2d 20, 24 (Minn. 1982).

In determining whether statutory discretionary immunity applies, courts distinguish between "planning" and "operational" decisions. *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn. 1988); *Hansen v. City of St. Paul*, 214 N.W.2d 346, 350 (Minn. 1974). Discretionary immunity protects planning-level decisions. *Larson v. Ind. Sch. Dist. No. 314*, 289 N.W.2d 112, 120 (Minn. 1979). Planning-level decisions are those that involve questions of public policy and require evaluating factors like the financial, political, economic, and social effects of a plan or policy. *Holmquist*, 425 N.W.2d at 232, 234. In contrast, operational-level decisions include scientific or professional decisions that do not involve balancing policy with political, economic, and social considerations. *Nusbaum v. Blue Earth Cnty.*, 422 N.W.2d 713, 720 (Minn. 1988). Some conduct may necessarily implicate both planning and operational decisions. For example, in response to misconduct allegations, the Minnesota Court of Appeals stated:

> Determinations [of] appropriate action to take under these circumstances were necessarily beset with policy-making considerations. For example, management needed to consider the importance of maintaining a workplace free of sexual harassment and the importance of deterring future misconduct. But while considering these policies, management may also have weighed competing policies, such as avoiding unnecessary disruption of the workplace and imposing discipline for alleged harassment only upon the establishment of substantial cause, both for the sake of staff and for protection from expense associated with proceedings premised on a claim of wrongful discipline. . . .
>
> The investigation and disciplinary decisions involved the type of legislative or executive policy decisions that we believe must be protected by discretionary immunity. The center's decisions did not simply require the application of professional judgment to a given set of facts, but were necessarily entwined in a layer of policy-making that exceeded the mere application of rules to facts.

Oslin v. State, 543 N.W.2d 408, 416 (Minn. Ct. App. 1996).

Other more specific statutes may affect the availability of discretionary immunity. For example, statutory discretionary immunity does not apply to whistleblower claims against boards.

Janklow v. Minn. Bd. of Exam'rs for Nursing Home Adm'rs, 552 N.W.2d 711, 716-18 (Minn. 1996).

c. *Licensing immunity*

Licensing immunity provides immunity for claims based on a person's failure to meet standards for licensing or other authorizations granted by the state. Minn. Stat. § 3.736, subd. 3(k). Licensing immunity is not limited to licensing actions. The law also immunizes the state and its employees against allegations arising from its other licensing activities, including inspections, evaluations, supervision, and related functions. *Andrade v. Ellefson*, 391 N.W.2d 836, 837 (Minn. 1986); *Gertken v. State*, 493 N.W.2d 290, 292-93 (Minn. Ct. App. 1992). In short, immunity applies if the challenged actions were directly related to the scope of the subject matter considered or involved in issuing the license. *Gertken*, 493 N.W.2d at 292.

2. Common law exclusions from liability

In addition to statutory immunity for tort actions, certain common-law immunities further protect board members against claims of allegedly tortious conduct. The most common forms of immunities for board members are discussed below.

a. *Official immunity*

Official immunity protects from personal liability a public official charged by law with duties that call for exercising judgment or discretion, unless the official is guilty of a willful or malicious wrong. *Rico v. State*, 472 N.W.2d 100, 106-07 (Minn. 1991); *Elwood v. Cty. of Rice*, 423 N.W.2d 671, 677 (Minn. 1988). Although statutory discretionary immunity and common-law official immunity both protect discretionary acts, "discretion" has a broader meaning in the context of official immunity. "Official immunity involves the kind of discretion which is exercised on an operational rather than a policymaking level, and it requires something more than the performance of 'ministerial duties.'" *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992). Official immunity is not granted for ministerial duties. *Ireland v. Crow's Nest Yachts, Inc.*, 552 N.W.2d 269, 272 (Minn. Ct. App. 1996). Ministerial duties are duties "in which nothing is left to discretion . . . a simple,

definite duty arising under and because of stated conditions and imposed by law." *Cook v. Trovatten*, 274 N.W. 165, 167 (Minn. 1937).

Statutory discretionary immunity is designed primarily to protect the separation of powers by insulating executive and legislative policy decisions from judicial review through tort actions. Official immunity, however, aims to ensure that threats of litigation or liability do not unduly inhibit public officials from exercising necessary discretion when discharging their duties. *Rico*, 472 N.W.2d at 107; *Holmquist*, 425 N.W.2d at 233 n.1. While official immunity ordinarily applies to the individuals' decisions, it also applies to policies adopted by a committee. *See Anderson v. Anoka Hennepin Indep. Sch. Dist*., 678 N.W.2d 651, 662 (Minn. 2004) (addressing policy adopted by committee of shop leaders on using table saws).

b. *Vicarious official immunity*

The doctrine of official immunity can be extended to protect the government employer from liability for its employees' acts. Vicarious official immunity furthers the purpose of official immunity when a person sues the governmental employer based on an employee's alleged negligence. *Pletan*, 494 N.W.2d at 44. Whether to extend official immunity to the government employer is a policy question that considers whether the lack of immunity would cause the public employee to think that his or her performance "was being evaluated so as to 'chill' the exercise of his independent judgment." *Ireland*, 552 N.W.2d at 272.

c. *Quasi-judicial immunity*

Judges are absolutely immune from lawsuits challenging their judicial decisions. *Mireles v. Waco*, 502 U.S. 9, 11 (1991). The only two narrow circumstances in which judicial immunity is unavailable are: (1) when a judge's action is not taken in a judicial capacity; and (2) when a judge's action is taken in the complete absence of jurisdiction. *Id.*

Minnesota courts confer quasi-judicial immunity to a broad array of public officials who exercise discretionary judgment as part of their function. *See Brown v. Dayton Hudson Corp.*, 314 N.W.2d 210, 213 (Minn. 1981) (holding that prosecutors qualify for quasi-judicial immunity); *DePalma v. Rosen*, 199 N.W.2d 517, 520 (Minn. 1972) (holding city council members were

entitled to quasi-judicial immunity); *Robinette v. Price*, 8 N.W.2d 800, 807 (Minn. 1943) (holding that county welfare board members were entitled to quasi-judicial immunity because of judgment-making nature of board's challenged decision); *Stewart v. Case*, 54 N.W.2d 938, 938-39 (Minn. 1893) (affirming quasi-judicial immunity for county assessors). Licensing boards act in a quasi-judicial capacity when deciding to impose remedial sanctions against a licensee. When performing this function, there is a strong argument that licensing boards and their members are entitled to quasi-judicial immunity. This immunity is the functional equivalent of judicial immunity and it would provide complete protection for a board and its members.

3. Punitive damages

As a general rule, courts cannot assess punitive damages against a governmental entity absent statutory authority. *See generally* 1 Am. Law Reports 4th 448, 453. Minnesota's Tort Claims Act expressly provides, "The state will not pay punitive damages." Minn. Stat. § 3.736, subd. 3. The Attorney General's Office has argued in certain court cases that, because punitive damages are typically awarded to punish a guilty party for the benefit of society, recovering punitive damages from the government would contravene public policy in that innocent taxpayers would be forced to pay the damages.

While it is clear that the state cannot be forced to pay punitive damages for tort claims, it is less clear whether this prohibition applies to punitive damages awarded against individual employees as there are no court decisions on this point.

4. Liability limits

The total liability dollar cap of the state and its employees acting within the scope of their employment on any tort claim is $500,000 per individual and $1,500,000 for any number of claims arising out of a single occurrence. *Id.*, subd. 4. Although municipalities, counties, and school boards often purchase liability insurance to cover tort claims, the state generally does not. Purchasing insurance waives the state's liability limits under the Tort Claims Act "only to the extent that valid and collectible insurance . . . exceeds those limits and covers the claim." *Id.*, subd. 8; *see also Pirkov-Middaugh v. Gillette Children's Hosp.*, 495 N.W.2d 608, 611

(Minn. 1993). The legislature has also eliminated joint and several liability for defendants found to be less than 50% at fault. Minn. Stat. § 604.02, subd. 1.

5. Indemnification

The Tort Claims Act establishes when the state will defend, hold harmless, and indemnify a state employee against expenses, attorney's fees, judgments, fines, and amounts paid in settlement in connection with any tort, civil, or equitable claim or demand. *Id.* § 3.736, subd. 9. In summary, the standard requires that the officer or employee: (1) meets the definition of "employee of the state," which includes board members; (2) was acting within the scope of his or her employment; and (3) provides complete disclosure and cooperation in defending the claim or demand. *Id.*

Acting within the scope of office or employment means that the employee was acting on the state's behalf in performing duties or tasks lawfully assigned by competent authority. *Id.* § 3.732, subd. 1(3). This means a board member or employee's acts must be part of the board's lawful duties or tasks as set out in the board's practice act, chapter 214, the APA, and other statutes that give the board its authority. The Tort Claims Act does not require the state to indemnify employees or officers in cases of malfeasance, willful or wanton actions, or neglect of duty. *Id.* § 3.736, subd. 9. Nor is the state required to indemnify employees for proceedings brought by or before responsibility or ethics boards or committees. *Id.*

Except for elected officials, a state employee is conclusively presumed to have been acting within the scope of employment if the employee's appointing authority issues a certificate to that effect. A board's decision to defend and indemnify an employee may be overturned by the Attorney General. The final determination, however, is a question of fact to be determined by the trier of fact, based on the circumstances of each case. *Id.*; *Nelson v. Schlener*, 859 N.W.2d 288, 295 (Minn. 2015) (holding that district court serves as trier of fact when certification is disputed). Before denying certification, boards should develop a strong factual record to support the decision. *See Nelson v. Schlener*, No. A13-0936, 2014 WL 502975, at *4 (Minn. Ct. App. Feb. 10, 2014) (holding that record lacked evidence to support certification denial), *vacated on other grounds*

859 N.W.2d 288 (Minn. 2015). If a state board is considering denying certification, the board should contact the assistant attorney general representing the board for advice on whether denying certification is appropriate and on what process to follow for making a certification decision.

The Attorney General is the attorney for all state boards. Minn. Stat. § 8.06. The Attorney General's Office generally provides the legal defense in most claims against state employees, meaning they do not need to retain or pay for private counsel. But, as discussed in section II of this manual, the Attorney General has broad discretionary powers to represent the interests of the state and state officials and decide not to undertake representation of state officials or employees when not in the public interest. *See Slezak*, 110 N.W.2d at 5. For example, the Attorney General does not provide representation for willful and want acts of malfeasance that are not covered by the Tort Claims Act. Minn. Stat. § 3.736, subd. 9.

The Tort Claims Act provides protection beyond a current lawsuit. If a party brings an action under the Tort Claims Act against a state employee and obtains a judgment, the party cannot bring any action against that employee for the same conduct in any other proceeding. Minn. Stat. § 3.736, subd. 10.

C. Violations of Federally Protected Rights (Section 1983 Actions)

A federal statute, 42 U.S.C. § 1983, creates a right to sue for deprivation of rights protected by the U.S. Constitution or by federal statutes. Section 1983 establishes no substantive rights but creates the right to sue for a violation of federal rights established elsewhere. The statute permits claims against persons who act "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . ." Because board members act under color of state law, board members are potential defendants in section 1983 actions.

1. Defense, indemnification, and scope of liability

The state has applied the indemnification and defense provisions of the Tort Claims Act to section 1983 actions. Accordingly, for the state to defend and indemnify, the act complained of must have been within the course of the defendant's employment. Further, as with tort actions, the law is unclear as to whether the state indemnifies section 1983 defendants for punitive damages.

Accordingly, a board member sued for punitive damages should get legal advice about defense and indemnification. Unlike tort claims, there is no cap on damages in a section 1983 lawsuit because federal law preempts the liability limits in the Tort Claims Act. In addition, a prevailing plaintiff in a section 1983 action is entitled to reimbursement of reasonable costs and attorney's fees. 42 U.S.C. § 1988. An attorney's fees award is also not subject to the liability limits of the Tort Claims Act.

2. Board member immunity

Both quasi-judicial and legislative immunity are available defenses to a section 1983 suit. A disciplinary proceeding is a quasi-judicial process. Quasi-judicial immunity applies to those who exercise quasi-judicial authority and to persons integral to the judicial process who must perform their functions without the chilling effect of potential lawsuits. Actions that are legislative in nature, such as rulemaking, are considered quasi-legislative. When state employees are performing quasi-judicial or quasi-legislative functions they are entitled to absolute immunity.

Qualified immunity is a more limited kind of immunity granted for administrative and investigative acts. Qualified immunity applies to individuals only, as opposed to boards or claims against employees in their official capacities. *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 808-10 (1982) (detailing types of individuals to whom qualified immunity applies). Qualified immunity is available in a section 1983 action if the state official did not violate any clearly established statutory or constitutional right. *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018); *Johnson v. Morris*, 453 N.W.2d 31, 38-39 (Minn. 1990).

A question in section 1983 suits against board members is whether they are analogous to judges and thus possess absolute immunity. If board members are viewed as analogous to administrators or investigators, they will have only qualified immunity. The difference between these two types of immunities is that absolute immunity defeats a lawsuit at the outset without the necessity of arguing the substance of the claims. Qualified immunity, on the other hand, does not necessarily avoid a review of the merits of a particular claim, but will ultimately be a defense to imposing liability on an official.

Even if a board member is entitled to absolute immunity, that immunity extends only to damages. A party who believes that a federally protected right is being, or is about to be, violated may sue for prospective injunctive relief. An example of such relief would be a lawsuit in which the plaintiff asks the court to declare a board rule unconstitutional.

When a plaintiff prevails in a section 1983 suit for prospective declaratory relief, judicial immunity does not bar an award of attorney's fees under 42 U.S.C. § 1988 against a judicial officer. *Pulliam v. Allen*, 466 U.S. 522 (1984).[9] Therefore, if a plaintiff obtains injunctive or declaratory relief against a board or a board member, the board or board member could be liable for an award of costs and reasonable attorney's fees. State law, however, provides for indemnification of a board member or employee from any personal liability for the award for any act within the scope of the board member or employee's duties. Minn. Stat. § 3.736, subd. 9.

3. Insurance against Section 1983 liability

Some local government entities, such as municipalities, counties, and school boards, purchase special insurance policies to cover liability for section 1983 actions. The state, however, has remained either uninsured or self-insured. The Department of Administration, Risk Management Division, is a resource for state boards to contact about insurance questions. The Risk Management Division can recommend about appropriate insurance coverage based on a board's specific needs and obtain insurance quotes for a board before insurance is purchased.

D. Antitrust Actions

Antitrust actions against state boards generally arise in two ways. First, a government enforcement agency (U.S. Department of Justice, Federal Trade Commission (FTC), or state attorney general) may bring a claim against a board if the statutes or rules under which the board acts, including the manner in which the board enforces them, have an anticompetitive effect.

[9] In 1996 Congress purported to reverse *Pulliam* by enacting the Federal Courts Improvement Act of 1996 ("FCIA"), Pub. L. No. 104-317. Section 309 of the FCIA appears to bar awards of costs or attorney's fees against judges in cases based on their judicial acts. It also appears to bar injunctive claims against a judicial officer. Courts are split as to whether the FCIA also applies to quasi-judicial acts.

Second, a person alleging to be injured by board conduct may bring an action against the board claiming that a statute or rule as applied to the person violates state or federal antitrust laws.

State entities can often assert a defense against antitrust lawsuits under what is known as the "state-action immunity doctrine," but specific conditions must be satisfied for certain types of boards to rely on the doctrine. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494 (2015). One area in which state action immunity is in doubt is when a "controlling number of decisionmakers" on the board are "active market participants." *Id.* at 510-12. In these circumstances, board members can still receive state-action immunity if the state has articulated a clear policy to allow the challenged conduct and the board is subject to active supervision by the state. *Id.* at 506-07. This supervision must provide a "realistic assurance" that the challenged conduct "promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). Further, the supervisor must review the substance (and not merely the procedure) of the decision, must have the power to modify or veto the decision, and must not be an active market participant. *N.C. Dental*, 574 U.S. at 515.

A court in another state denied state-action immunity after determining that, despite judicial review of a board's disciplinary decisions, the board was not subject to active supervision because the scope of the judicial review was limited and did not enable courts to review the board's decisions for consistency with state policy. *Teladoc, Inc. v. Tex. Med. Bd.* , No. 1-15-CV-343 RP, 2015 WL 8773509, at *9 (W.D. Tex. Dec. 14, 2015). Additionally, the FTC found that a board in another state was not subject to active supervision, even when it submitted a proposed rule to an agency commissioner, the legislature, and the governor. Although all had authority to overrule the decision, the FTC noted the lack of evidence of the actual level of review that the rule was subject to. *La. Real Estate Appraisers Bd. v. FTC*, No. 9374 (FTC Apr. 10, 2018).

E. Defamation

Defamation is another potential claim board members may face. For a statement to be considered defamatory "it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower him in the estimation of the

community." *Stuempges v. Parke Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); Restatement (Second) of Torts §§ 558-59. As outlined in more detail below, certain defenses and privileges may be raised in response to a defamation claim.

1. Defenses to a defamation claim

The two primary defenses to a defamation claim are truth and privilege. Truth is an absolute defense to a defamation claim. A privilege defense may apply when a state board is the defendant in a defamation action. If an absolute privilege applies, immunity is given even for intentionally false statements made with malice. *Matthis v. Kennedy*, 67 N.W.2d 413, 416 (Minn. 1954).

2. Immunities

Not all immunities apply to defamation claims. Courts have held that good-faith immunity applies to defamation claims against the state and its employees, but discretionary and official immunity do not apply. *See Bauer v. State*, 511 N.W.2d 447, 448 (Minn. 1994) (addressing official immunity); *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982) (addressing good-faith immunity); *Bird v. Dep't of Pub. Safety*, 375 N.W.2d 36, 41 (Minn. Ct. App. 1985) (addressing discretionary immunity).

3. Opinions and the First Amendment

Statements of opinion are not defamatory as a matter of law. *McKee v. Laurion*, 825 N.W.2d 725, 733 (Minn. 2013). When a statement plainly reflects "a subjective view, an interpretation, a theory, conjecture, or surmise" and does not reflect a claim to know objectively verifiable facts, the statement is not actionable. *Schlieman v. Gannett Minn. Broad., Inc.*, 637 N.W.2d 297, 308 (Minn. Ct. App. 2001). Additionally, "[e]xpressions of opinion, rhetoric, and figurative language are generally not actionable if, in context, the audience would understand the statement is not a representation of fact*." Bebo v. Delander*, 632 N.W.2d 732, 739 (Minn. Ct. App. 2001). Imprecise or indefinite statements are also not actionable as statements of opinion. For a statement to be defamatory, it must be "precise, specific, [and] verifiable." *Id.* Accordingly, an imprecise attack on a personal characteristic is not defamation as a matter of law. *Lund v. Chicago*, 467 N.W.2d 366, 369 (Minn. Ct. App. 1991).

Courts consider four factors to determine whether a statement is one of fact or opinion: "(1) the precision and specificity of the statement; (2) the statement's verifiability; (3) the social and literary context of the statement; and (4) the public context in which the statement was made." *Id.* The use of "cautionary language" further signals that the statement is opinion. *Capan v. Daugherty*, 402 N.W.2d 561, 564 (Minn. Ct. App. 1987) (holding words such as "suggested" and "makes me think" and "maybe" to signal the giving of an opinion). Ultimately, the court will consider the totality of the circumstances. *Id.*

Not all opinions are protected by the First Amendment. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 18-21 (1990). The First Amendment protects from defamation claims only statements about matters of public concern that are not capable of being proven true or false and statements that cannot be reasonably interpreted as stating facts. *Id.*; *see also Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995).

4. Qualified privilege

Qualified privilege protects the state and its employees from liability for allegedly defamatory statements on matters related to their duties as public officials. *See Bird*, 375 N.W.2d at 41. Qualified privilege also exists for all defendants if the allegedly defamatory statement was made on a proper occasion, for a proper purpose, and on reasonable grounds for believing the truth of the statement. *Stuempges*, 297 N.W.2d at 256-57.

5. Absolute privileges

In certain contexts, statements by boards or their members carry an absolute privilege and cannot form the basis for defamation. These contexts typically include publications required by law, statements made in judicial and quasi-judicial proceedings, and statements made in legislative proceedings.

a. *Publications required by law*

Public officials and public bodies, like state boards, have an absolute privilege to publish defamatory matter when required by law to do so. Restatement (Second) of Torts § 592A. Because some boards' governing statutes require publishing all disciplinary measures the board takes, those

boards and their members have an absolute privilege against a defamation claim based on the contents of the published disciplinary action. *See, e.g.*, Minn. Stat. § 147.02, subd. 6; *LeBaron v. Minn. Bd. of Pub. Def.*, 499 N.W.2d 39, 42-43 (Minn. Ct. App. 1993) (holding that statements in public defender's letter to Board of Public Defense about employee's termination were absolutely privileged because law required report). Similarly, the MGDPA classifies licensing boards' final disciplinary action as public data, thereby requiring boards to disclose final decisions as public data. Minn. Stat. § 13.41, subd. 5.

b. *Judicial and quasi-judicial proceedings*

There is an absolute privilege for communications made in a judicial or quasi-judicial proceeding. *See Matthis*, 67 N.W.2d at 417. For example, in *Freier v. Independent School District No. 197*, 356 N.W.2d 724 (Minn. Ct. App. 1984), a school board and its members were not liable for defaming a teacher when they published a termination decision that was later reversed on appeal. The court reasoned that teacher-discharge proceedings were quasi-judicial proceedings and communications incidental to judicial proceedings are absolutely privileged, whether or not they are defamatory. *Freier*, 356 N.W.2d at 728-29. From this case it appears to follow that a state board would not be held liable for defamation for disclosing the outcome of a disciplinary action. As discussed earlier, however, the MGDPA or a board's practice act may prohibit disclosure of certain information.

c. *Legislative proceedings*

The speech-and-debate clause of the Minnesota Constitution provides an absolute privilege for all statements made during legislative proceedings. Minn. Const. art. IV, § 10; *Carradine v. State*, 511 N.W.2d 733, 734-35 (Minn. 1994). But this privilege does not apply if statements were not made within the sphere of legitimate legislative activity. *Olson v. Lesch*, 943 N.W.2d 648, 655-56 (Minn. 2020).

IX. CONTRACTING

Although most state contracting laws are in chapter 16C of the Minnesota Statutes, numerous other statutorily required contract clauses are scattered throughout the statutes. Every state agency must contract in accordance with the state procurement statutes. Minn. Stat. §§ 16C.001, 16C.05, subd. 1. For purposes of chapter 16C, an agency means any state officer, employee, board, commission, authority, department, entity, or organization of the executive branch of state government. *Id.* § 16C.02, subd. 2. While a few specific state organizations such as public corporations are exempt from the requirements of chapter 16C, most state boards are subject to the requirements.

A. Who Is Responsible for What

State law divides the responsibility for contracting for services primarily between the head of the board requesting the contract and the Commissioner of Administration. *Id.* §§ 16C.03, subd. 16, 16C.05, subd. 1.

1. Board responsibilities

Unless altered by statute, the board is responsible for:

1. Identifying the need and specifications for a contract and determining who the contractor will be;

2. Drafting the contract;

3. Encumbering the funds in the Statewide Integrated Financial Tools (SWIFT) before the contract can be valid. *Id.* §§ 16C.05, subd. 2(a)(3), 16C.08, subd. 2(4); and

4. Ensuring that the parties comply with the contract's terms and conditions and state law, that the contracting parties expend funds in accordance with the contract and state law, and that the results of the contract (the product delivered or the service provided) comply with the contract.

Depending on the type and value of the contract, the board may need to provide additional information and certify to the Commissioner of Administration that specific circumstances exist or have been met before the contract will be valid. *Id.* § 16C.08, subd. 3. These requirements are listed below in section B.

2. Commissioner of Administration responsibilities

The Commissioner of Administration approves or disapproves a board's decision to contract for goods or services and its selection of a contractor. *Id.* §§ 15.061, 16C.05, subd. 2(a)(2), 16C.08, subd. 3. The Department of Administration must sign all certifications for contracts valued at more than $25,000 for professional and technical services (calculated over the entire life of the contract, including any potential extensions). *Id.* § 16C.08, subd. 3.

B. Types of Contracts

Different requirements may apply depending on the type of contract the board is entering. The following sections address common types of contracts and their associated requirements.

1. Contracts for professional or technical services

"Professional or technical services" means services that are intellectual in character, and that result in producing a report or completing a task. These types of services include consulting, analyzing, evaluating, predicting, planning, programming, or recommending. Professional or technical contracts do not include providing supplies or materials, except when incidental to providing professional or technical services or when approved by the Commissioner of Administration. *Id.*, subd. 1.

All contracts for professional or technical services must include two statutorily required provisions, which are described below:

1. The contract must permit the Commissioner of Administration to unilaterally terminate the contract before completion with or without cause, upon payment of just compensation. The law does not specify the length of notice required to invoke the cancellation clause and does not prohibit the board from also having similar power to unilaterally terminate the contract before completion. The board has discretion to allow the contractor to terminate the contract before completing the contract.

2. The contract must provide that the board retain 10% of the amount due under the contract until it certifies to the Commissioner of Administration that the contractor

satisfactorily fulfilled the contract's terms, unless specifically excluded in writing by the Commissioner of Administration.[10]

Id., subd. 2(9)-(10).

Additionally, boards entering a contract for professional or technical services must comply with the following obligations:

1. The board cannot enter a contract if a current state agency employee is able and available to perform the services called for by the contract;

2. Unless otherwise authorized by law, the board must use a competitive proposal process to acquire professional or technical services. But the board should not use a competitive bidding process to acquire professional or technical services;

3. The board must assign specific board personnel to manage each contract;

4. The board will not allow a contractor to begin work before the funds are fully encumbered and the contract is fully executed unless an exception under Minn. Stat. § 16C.05, subd. 2a, has been granted by the Commissioner of Administration;

5. The contract cannot establish an employment relationship between the state or the board and any persons performing under the contract;

6. If the results of the contract work will be carried out or continued by state employees after completing the contract, the contractor must include state employees in development and training, to the extent necessary to ensure that state employees can perform any ongoing work;

7. The board cannot contract out its previously eliminated jobs for four years without first considering the same former employees who are on the seniority unit layoff list who meet the minimum qualifications determined by the board; and

8. The contractor and agents cannot be state employees.

Minn. Stat. § 16C.08, subd. 2(1)-(8).

[10] The retainage requirement does not apply to contracts for professional services as defined in Minn. Stat. §§ 326.02-.15, regarding the regulation of architects, engineers, surveyors, landscape architects, geoscientists, and interior designers. Minn. Stat. § 16C.08, subd. 2(10).

For professional or technical services contracts valued more than $5,000, a board must use a competitive proposal process to procure the services unless a statutory exemption exists. *Id.* § 16C.10, subd. 6. For professional or technical services contracts valued between $5,000 and $25,000, no advertised solicitation is required, and the board can use a solicitation form referred to as a "quick call." *Id.* §§ 16C.06, subd. 1, .10, subd. 6. The board should determine the scope of work and deliverables that will be used to create the quick call for proposals and send the request to at least three vendors. When the board is satisfied with the negotiated contract language with the vendor, the contractor and the board head or a designee sign the agreement and send it to the Department of Administration for external review.

For professional or technical services contracts valued at more than $25,000, the board must complete a contract-certification form and obtain the Commissioner of Administration's approval before sending out a request for proposals, either informal ($25,000-$50,000) or formal (more than $50,000). *Id.* § 16C.06, subd. 2. Informal requests for proposals for technical professional services may be published in the State Register or posted on the Department of Administration's Office of State Procurement webpage. *Id.* § 16C.06, subd. 1.

To obtain the Commissioner's approval, the board must provide the solicitation documentation along with the following for the Commissioner to review and approve:

1. A certification that the board has verified or complied with all provisions of section 16C.08, subdivision 2, and section 16C.16;

2. A description demonstrating that the board has authority to enter the contract and that work to be performed under the contract is necessary to the board achieving its statutory responsibilities;

3. A description of the board's plan to notify firms or individuals who may be available to perform the services sought in the solicitation;

4. A description of the performance measures or other tools that the board will be use to monitor and evaluate contractor performance; and

5. A description of the procurement method the board will use to address accessibility standards for technology services.

Id., subd. 3(1)-(5).

2. Contracts for goods or non-professional or technical services contracts

The Office of State Procurement of the Department of Administration offers procurement training programs during the year to state personnel. The training covers purchasing policies and procedures for obtaining goods or non-professional or technical services. If you are interested in any of the classes, please visit the Office of State Procurement's website at *mmd.admin.state.mn.us*.

3. Grants and loans

Grants and loans are a class of contracts that provide funding to an outside entity to provide services or support to a third party not employed by the state. Boards can enter contracts for grants and loans only if the authority is specifically given in a statute. This type of authority and is generally directly related to the appropriations that fund grants and loans. The Office of Grants Management, a division of the Department of Administration, provides guidance to boards regarding the administration and management of state grants. The Office of Grants Management's website is *mn.gov/admin/government/grants*.

4. Interagency agreements and joint powers agreements

Agreements with other governmental units are contracts. They may be for services, grants, or loans, but they should be treated like contracts. Boards' authority to enter agreements with other state agencies is, in most cases, not clearly defined. Most state boards do not have specific authority. Instead, their authority is defined in the Joint Powers Act, which gives governmental units broad authority to enter agreements with each other. Minn. Stat. § 471.59. "Governmental unit" is broadly defined to include any state or federal agency, cities, counties, towns, school districts, independent nonprofit firefighting corporations, other political subdivision of Minnesota or other states, federally recognized Indian tribes, the University of Minnesota, the Minnesota Historical Society, certain historic preservation corps, licensed nonprofit hospitals, rehabilitation

facilities, certain extended employment providers, and any instrumentality of a governmental unit. *Id.*, subd. 1(b).

Interagency agreements are between two or more state agencies, while joint powers agreements are between two or more governmental units. Under the Joint Powers Act, the governing body of any governmental unit may enter agreements with any other governmental unit to perform on behalf of that unit any service or function that the governmental unit providing the service or function is authorized to provide for itself. A governmental unit participating in a joint enterprise or cooperative activity with another governmental unit will not be liable for the acts or omissions of the other governmental unit unless it has agreed in writing to be responsible for them. *Id.* § 471.59, subd. 1a.

C. Basic Elements of a State Contract

Boards are encouraged to use state-approved contract forms when possible. The forms contain required statutory language and other contract terms that are generally in the state's best interests. The Department of Administration's *Professional/Technical Services Contracts Manual* is a helpful resource. Additionally, sample contract forms are available on the Department's website at *mmd.admin.state.mn.us/mn05000.htm*. Because these forms are generic, additional clauses may be necessary in some situations. The Department's manual is helpful for identifying these special situations. Some specific contracting considerations follow.

1. Authority

The board must have statutory authority to enter a particular contract. The contractor is presumed to have authority to enter the contract unless it is another public agency.

2. Solicitation process

The requirements governing competitive solicitation for various types of state contracts are primarily in chapter 16C of the Minnesota Statutes. Boards may purchase goods, services, or construction up to $25,000 directly from a small business, small target group, or a veteran-owned business without using a competitive solicitation process. *Id.* § 16C.16, subds. 6(b), 6a(b). The

Department's *Professional/Technical Services Contract Manual* provides further assistance on requirements for advertising, consideration, and award.

3. Encumbering funds

A board cannot agree to incur an expense unless it has encumbered sufficient money to cover the expense. Minn. Const. art. XI, § 1; Minn. Stat. § 16C.05, subd. 2(3). "Encumbered" means that the board has identified the source of the funds to pay the expense and committed them so they will be available when the payment is due. *Id.* § 16A.011, subd. 11. Generally, this also means that a board cannot agree to indemnify a contractor or to pay expenses such as a contractor's reasonable court costs, attorney's fees, penalties, or damages for economic harm.

4. Non-appropriations clause

Contracts that extend beyond the appropriations period should contain language addressing the possibility of non-appropriations. The following statement is recommended: "Continuing this agreement beyond June 30 of any year is contingent on continued legislative appropriation of funds for the purpose of this agreement. If these funds are not appropriated, the State will immediately notify Contractor in writing and the agreement will terminate on June 30 of that year. The State shall not be assessed any penalty if the agreement is terminated because of the decision of the legislature not to appropriate funds." A board may only agree to pay a penalty under specified circumstances if the board first encumbers the money to pay the potential penalty.

5. Advance payment

A board generally cannot obligate the state to pay in advance for goods or services. Minn. Stat. § 16A.41, subd. 1. The only advance payments that can be made are for software or software-maintenance services for state-owned or leased computer equipment; for information technology hosting services; for sole-source maintenance agreements when it is not cost-effective to pay in arrears; for exhibit booth space or boat-slip rental when required to guarantee space availability; for registration fees when advance payment is required or an advanced payment discount is provided; and for newspaper, magazine, and other costs that are either customarily paid in advance

or for which an advance-payment discount is provided. *Id.* § 16A.065. Prepayments can also be made to the Library of Congress and the Federal Supervisor of Documents. *Id.*

6. Audit clause

All state contracts must include an state audit clause that allows the contracting board, the legislative auditor, or the state auditor to examine the contracting party's relevant books, records, documents, and accounting procedures for at least six years. *Id.* § 16C.05, subd. 5. The only exception is when the state is selling, leasing, or licensing its own software or data to a purchaser. Note that this audit clause does not subject all of the contracting party's books and records to an audit, but only those relevant to the contract or transaction at issue.

7. Minnesota Government Data Practices Act

When a board contracts with private persons to perform any of the board's functions, the contract must make clear that data created, collected, received, stored, used, maintained, or disseminated by the private persons in performing those functions is subject to the requirements in the MGDPA and that the private persons must comply with those requirements as if they were a government entity. *Id.* § 13.05, subd. 11. All contracts entered by a board must include notice that these requirements apply to the contract, but failing to include the notice in the contract does not invalidate the application of these requirements.

A board cannot agree to keep the contractor's data confidential except in accordance with the MGDPA. *See id.* ch. 13. Boards should therefore carefully review any contractor's proposed confidentiality clause.

8. Term

For goods, general services, and building construction, the original contract cannot exceed two years unless the Commissioner of Administration determines that a longer duration is in the state's best interests. *Id.* § 16C.06, subd. 3b(a). The contract and any amendments to it further cannot have a combined term longer than five years without the Commissioner's specific approval unless otherwise provided by law. *Id.* For professional or technical services, the combined contract and amendments must not exceed five years, unless provided by law. *Id.*, subd. 3b(b). The term of

a contract may be extended up to a total of ten years, if the Commissioner of Administration, in consultation with the Commissioner of Minnesota Management Budget, determines that the contractor will incur upfront costs under the contract that cannot be recovered within a two-year period and that the extension will save the state costs that will be amortized over the life of the contract. *Id.*, subd. 3b(c). Additionally, special provisions address entering contracts for up to 31 years with a district heating or cooling entity. *Id.*, subd. 3b(d).

9. Intellectual property rights

If a contract is for services that will produce intellectual property for the state, the contract should contain language protecting the state's intellectual property rights. Before executing a contract or license agreement involving intellectual property developed or acquired by the state, a board shall seek comment from the Attorney General on the terms and conditions of the contract or agreement. *Id.* § 16C.05, subd. 2(f).

10. Affirmative action

For all contracts for goods, services, and capital projects exceeding $100,000, a board may need to ensure compliance with Minnesota human-rights and affirmative-action laws. When a contractor has 40 or more full-time employees, either in Minnesota or the state where contractor has its primary place of business, the contractor must have a workforce certificate from the Commissioner of Human Rights or certify in writing that the contractor is exempt. *See id.* § 363A.36, subd. 1. For contracts for goods, services, and capital projects over $500,000, the contractor may need an equal-pay certificate. *Id.* § 363A.44, subd. 1.

11. Prohibitions on contracts with vendors who discriminate against Israel.

For contracts with values exceeding $50,000, a board cannot contract with a vendor that discriminates against Israel or against people or entities during business with Israel when the vendor makes operational decisions. *Id.* § 16C.053. "Discriminate" in this context includes refusing to deal, terminating business activities, or engaging in other actions intended to limit commercial relations with Israel when the action is taken to discriminate based on nationality or

national origin rather than a valid business reason. *Id.*, subd. 1(b). The contract should include the vendor's certification that it does not and does not plan to discriminate in this manner.

12. E-Verify

A contract for services valued more than $50,000 must require the vendor and any subcontractors to certify that, as of the date services will be performed on the state's behalf, the vendor and all subcontractors have either implemented or are in the process of implementing the federal E-Verify program for new employees who will perform work on the state's behalf. *Id.* § 16C.075. This requirement does not apply to contracts entered by the State Board of Investment or to contracts entered by the Office of Higher Education related to credit-reporting services if the office certifies that it cannot otherwise reasonably obtain the services. *Id.*

13. Execution

State law has particular signature requirements. Minn. Stat. § 16C.05, subd. 2(a). The state has developed the following routing procedure for examining and executing contracts: (1) the other party (e.g., contractor, consultant); (2) the state agency entering into, and encumbering funds for, the contract; and (3) the Department of Administration (excluding grants or interagency agreements). The Department has also issued guidance for using electronic signatures. The guidance can be found at *mmd.admin.state.mn.us/alpappendices.htm* (Policy 19-01).

If a subordinate member or board employee signs the contract, he or she must be lawfully delegated the authority to do so. *See id.* §§ 15.06, subd. 6, 16C.05, subds. 1, 2(a)(1).[11] The Secretary of State maintains a list of state personnel legally authorized to enter certain agreements for their respective state agencies. For contractors that are corporations, at least one corporate officer must sign the contract, but two corporate-officer signatures are preferable. If persons other than corporate officers have signed, the board must obtain a corporate board resolution authorizing the signatures.

[11] Certain boards' contracts must be approved by a majority of the board's members and executed by the board's chair and executive director. *E.g.*, Minn. Stat. § 3.922, subd. 5 (Indian Affairs Council); Minn. Stat. § 15.0145, subd. 4(d) (Minnesota Council on Latino Affairs, Council for Minnesotans of African Heritage, and Council on Asian-Pacific Minnesotans).

14. Amendments

An amendment to a prior agreement must be in writing and must clearly reference the prior agreement. The amendment is subject to the same signature process as the original contract. If a contract has already expired by its terms, the best practice is to execute a new contract rather than executing an amendment to extend the contract.

D. Other Minnesota Government Data Practices Act Considerations

A private person who obtains government data under a contract with a board can be found liable for violating the MDGPA. Minn. Stat. § 13.05, subd. 11(a). But, except as required by the terms of a contract, private persons do not have a duty to provide public access to public data that are available from the government entity. *Id.*, subd. 11(b). Similarly, when a contract requires that data on individuals be made available to the contracting parties by the board, that data shall be administered consistent with the MGDPA. *Id.* § 13.05, subd. 6.

The classification of data that a board receives from business for bids or in response to requests for proposals is governed by Minn. Stat. § 13.591, subd. 3. Data classifications may change at various points during the procurement process.

X. COMPENSATION

In general, board members and members of advisory councils and committees are compensated by a per diem rate set at $55 for each day spent on board activities, when authorized by the board. Members also receive expenses in the manner and amount authorized by the Commissioner's Plan, which is a plan developed by the Commissioner of Minnesota Management and Budget and approved by the Legislative Coordinating Commission. Minn. Stat. §§ 15.0575, subd. 3, 15.059, subd. 3. Members of health-related licensing boards may be compensated at the rate of $75 per day spent on board activities. *Id.* § 214.09, subd. 3(a). In contrast, some laws do not allow per diem payments. *See, e.g.*, *id.* § 97A.055, subd. 4b(g) (providing that members of Department of Natural Resources citizen-oversight committee do not receive per diem).

Expenses and per diems can be paid only when authorized by a board. Each board must adopt internal standards prescribing what constitutes a day spent on official activities for purposes of paying per diem. *Id.* § 15.0575, subd. 3(c). The board may also authorize per diems and expenses in various ways so that the work can be accomplished without having to authorize every request for a per diem or expense. For example, a board may delegate to its executive director or president the authority to approve per diems for board members engaged in disciplinary work or rulemaking. The delegation may include establishing a minimum number of hours that must be accumulated before a per diem can be claimed. A board can also authorize its executive director or chair to set the maximum number of per diems that can be claimed for a single project, such as reviewing a contested-case record before a board hearing.

In general, a board member who is also employed by the state or a political subdivision cannot be compensated by both the board and the employer for time spent on board activities. *Id.* §§ 15.0575, subd. 3(b), 15.059, subd. 3(b), 214.09, subd. 3(b). This limitation aims to prevent "double dipping." But a board member or employee may receive a daily payment if the employee uses vacation time for board activities. Similarly, the board member or employee should not lose compensation or benefits as a result of board service and the employee can receive expenses unless

the expenses are reimbursed from another source. But the employee's childcare expenses may be reimbursed only for time spent on board activities that are outside normal working hours.

It is important that board employees understand the specific statute that applies to their board when determining eligibility for a per diem. Whether someone is a full-time state or political-subdivision employee is also not always clear. Courts have recognized a difference between public officials and employees in other contexts. A public officer or official is distinguished from a public employee in the greater "importance, dignity and independence" of the official's position. *Tillquist v. Dep't of Labor & Indus.*, 12 N.W.2d 512, 514 (Minn. 1943); *see also Cahill v. Beltrami Cty.*, 29 N.W.2d 444, 446-48 (Minn. 1947) (holding that because sheriff was officer of court, his salary could be established by district court rather than county board). Certain statutes refer to both employees and to officers or public officials. *See, e.g.*, Minn. Stat. § 15.054. But if a public official is paid about the same amount of money as a full-time salary for some employee positions, it could be argued that the spirit of the law precludes any other payment or per diem to the public official. *See, e.g.*, *Jerome v. Burns*, 279 N.W. 237, 240 (Minn. 1938) (holding that city clerk was not entitled to additional compensation for services already performed in course of his official duties as city commissioner of registration). Anyone with questions regarding whether a member is a state or political-subdivision employee should contact the assistant attorney general assigned to the board.

At times, an executive director must question a board member about a request for a per diem or expense reimbursement. When that happens, keep two things in mind. First, the executive director is in the uncomfortable position of asking his or her "boss" to explain himself or herself. Second, board-member compensation is thoroughly scrutinized by the legislative auditors. The executive director's questions protect the board and its members from embarrassment by clearing up these matters in advance of an audit.

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